The Common-Law Background of Nineteenth-Century Tort Law

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I. INTRODUCTION

A century ago Oliver Wendell Holmes, Jr., examined the history of negligence in search of a general theory of tort. He concluded that from the earliest times in England, the basis of tort liability was fault, or the failure to exercise due care.[1] Liability for an injury to another arose whenever the defendant failed "to use such care as a prudent man would use under the circumstances."[2] A decade ago Morton J. Horwitz reexamined the history of negligence for the same purpose and concluded that negligence was not originally understood as carelessness or fault.[3] Rather, negligence meant "neglect or failure fully to perform a pre-existing duty, whether imposed by contract, statute, or common-law status."[4] Because the defendant was liable for the breach of this duty regardless of the reason for his nonfeasance, Horwitz argues, the original standard of tort liability was not fault but strict liability. He maintains that the fault theory of negligence was not established in tort law until the nineteenth century by judges who sought "to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development."[5] The modern notion of negligence, then, was incorporated into tort law by economically motivated judges for the benefit of businessmen and business enterprises.

Other scholars have also entered this debate. Professor Gary Schwartz, for example, studied the appellate tort decisions of five states—New Hampshire, California, Delaware, Maryland, and South Carolina—through the nineteenth century.[6] He concluded that economic entrepreneurs and entities, such as railroads, were not favored by the courts in these states. Nor did Schwartz find the transformation in tort rules that Horwitz claims was characteristic of nineteenth-century law. However, scholars such as Lawrence Friedman argue that the modern doctrine of negligence as fault "has to be attributed to the industrial revolution—to the age of engines and machines [which] have a marvelous

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1. O. HOLMES, JR., THE COMMON LAW 111 (1881).

2. *Id.*

3. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 85-101 (1977).

4. *Id.* at 87.

5. *Id.* at 100.

6. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989). *See also* Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Wigmore, *Responsibility for Tortious Acts: Its History - III*, 7 HARV. L. REV. 441 (1894).

capacity to cripple and maim their servants."[7] According to Friedman, nineteenth-century judges believed that holding businesses strictly liable for all the injury they caused could have drained them of their economic blood. Consequently, these judges reduced tort liability to a standard of ordinary care "to limit damages to some moderate measure" so that capital could "be spared for its necessary work."[8]

The question whether tort liability for personal injuries originally was fault or strict liability probably will never be answered.[9] Moreover, whether liability was negligence or strict liability, with notable exceptions, was not an issue in tort cases prior to the nineteenth century.

This Article therefore proposes a different conceptual approach to the early history of tort. It tries to explain early tort cases in their own context, rather than within the modern paradigm of fault versus strict liability. This approach focuses on the principles and policies that judges explicitly used to decide the scope of tort liability and to determine the rules of decision they applied in tort cases.

This perspective reveals that, rather than a sharp change in nineteenth-century tort rules, principles, and policies, continuity and consistency characterized tort law. Judges from the seventeenth century in England to the nineteenth century in the United States expressed in their tort decisions the same policies, the same values, and the same principles. They used tort law to make people behave in morally appropriate ways by holding them to community standards of reasonable behavior in the circumstances in order to minimize injuries and losses, and to promote honesty and fairness in economic relationships. In certain kinds of cases, these principles led judges to hold defendants strictly liable. The same principles led judges to decide other types of cases on the question of whether defendants had acted carelessly. Moreover, English judges reformulated tort rules of liability to promote these public policies as conditions changed. Thus, judicial instrumentalism, understood as judges formulating, modifying, and changing legal rules to achieve public policy goals, was characteristic of the common law for centuries. It was not new to the nineteenth century, as legal historians generally believe. Nonetheless, the evidence presented in this Article will show that the fault-based system of tort law was established by the eighteenth century, before the industrial revolution in England and the United States. This Article is a corrective to the prevailing views of legal historians who argue that negligence was a nineteenth-century by-product of the industrial revolution.

The significance of this study goes beyond historical interest. The law and economics movement has challenged traditional notions of tort and other areas of law in the past twenty-five years. Law and economics theorists argue that legal rules and theories of liability should be changed to promote economic effi-

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7. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 300 (2d ed. 1985).

8. *Id.* at 469; M. HORWITZ, *supra* note 3, at 99.

9. *Compare* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 295-300 (2d ed. 1981) *with* I SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307-99 xlii-xliii (M. Arnold ed. 1985) [hereinafter SELECT CASES]. *See infra* notes 296-301 and related text.

ciency.[10] They also insist that economic analysis will provide a more value-free, neutral system of justice than the traditional conception of law. A leading proponent of the movement, Judge Richard Posner, has invoked the nineteenth-century history of tort to make a normative argument in support of the economic analysis of law.[11] The discussion that follows can contribute to today's debate by offering a corrective to Judge Posner and other scholars who use legal history to support their argument that the law of tort should promote economic efficiency.

The early history of tort is contained in two strands of cases.[12] One involved the negligent performance of an undertaking, calling, or office between parties who were in a prior relationship. This kind of case was in the common law for centuries. The second strand involved parties who were not in a prior relationship. The plaintiff's action was based on the defendant's failure to guard against foreseeable injury. Although examples can be found earlier, this kind of case primarily emerged in the last quarter of the seventeenth century.

This Article will examine both strands of cases. Its examination of cases involving parties in a prior relationship focuses on common carrier cases from seventeenth-century England to approximately mid-nineteenth-century United States. Part II discusses common carrier liability for lost or damaged goods, and Part III analyzes common carrier liability for injuries to passengers. One reason for focusing on common carriers is obvious: If judges changed tort rules in the nineteenth century to promote economic development, then one would expect to find judges changing tort liability when railroads emerged as the pre-eminent nineteenth-century economic institution. The second reason for focusing on common carriers is that the law of common carriers was of central importance to the development of this aspect of tort law. The early cases relating to injuries to strangers generally do not involve common carriers; they are of a more general nature, at least insofar as the parties are concerned. These cases involving tort liability for injuries to strangers are discussed in Part IV.

II. THE COMMON LAW OF COMMON CARRIERS OF GOODS

Common carrier liability for lost or damages goods derived from the law of bailments. Nonetheless, prior to the eighteenth century, common carriers of goods could be sued under different legal theories. According to the most authoritative eighteenth-century English treatise on the subject, they were originally liable in tort for ordinary care.[13] However, the courts of England changed this tort standard to strict liability sometime during the late sixteenth or early seventeenth century. Thereafter, common carriers were held strictly liable in

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10. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

11. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972). *But see* Epstein, *The Static Concept of the Common Law*, 9 J. LEG. STUD. 253, 269-75 (1980).

12. M. PRICHARD, *SCOTT V. SHEPHARD* (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE 15-16 (1976).

13. W. JONES, ESSAY ON THE LAW OF BAILMENTS *103. *See also* 2 THE REPORTS OF SIR JOHN SPELMAN 224-28 (J. Baker ed. 1978) [hereinafter REPORTS]; J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 337-38 (2d ed. 1978); A. KIRALFY, THE ACTION ON THE CASE 154-56 (1951).

tort on the custom of the realm.[14] In the seventeenth century they might also be sued for negligence in actions of assumpsit, or on a contract theory, for the precise terms of their undertaking.[15]

This statement of pre-eighteenth-century common-carrier liability is somewhat anachronistic. It delineates the distinction between tort and contract with

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14. Rich v. Kneeland, Hob. 17, Eng. Rep. (K.B. 1613). However, Jones maintained that common carrier liability for loss or damage due to causes other than robbery continued to be ordinary negligence through the eighteenth century. W. JONES, *supra* note 13, at *104-05. John H. Pagan, relying on E. FLETCHER, THE CARRIER'S LIABILITY xiii, 51-101 (1932), agrees with Jones. *See* Pagan, *English Carriers' Common-Law Right to Reject Undeclared Cargo: The Myth of the Closed Container Convention*, 23 WM. & MARY L. REV. 805 (1982). Seventeenth- and early eighteenth-century cases relating to the right of common carriers to contract out of strict liability suggest that strict liability was the established standard in actions on the case on the custom of the realm by the seventeenth century. *See infra* notes 6-73 and accompanying text. Thus, I agree with Kiralfy and Fifoot that common carriers were strictly liable on the custom of the realm by the seventeenth century. *See* A. KIRALFY, *supra* note 13, at 156; C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 161 (1949).

Jones seems to have based his interpretation of the rule on policy objectives served by the strict liability standard and on a misreading of case law. He reasoned that "maxims of policy and good government" require that losses from robbery only be excepted from the standard of ordinary care to prevent collusion between carriers and "desperate villains." W. JONES, *supra* note 13, at *105. Moreover, he interpreted the 1750 decision in Dale v. Hall, 1 Wils. 281, 95 Eng. Rep. 619 (K.B. 1750), as retaining the older standard of negligence for losses from causes other than robbery. However, Jones appears to have incorrectly interpreted the court's opinion. The defendant in this case was a shipmaster whom the plaintiff hired to transport metal hardware. The goods rusted when water leaked through holes made by rats in the ship's bottom. Plaintiff brought an action on the case, but not on the claim that the defendant was a common carrier who was liable on the custom of the realm. Rather, plaintiff sued in assumpsit and pleaded that the defendant carried the goods "so negligently . . . that they were spoilt, to the plaintiff's damage." *Id.* at 281, 95 Eng. Rep. at 619. At trial, plaintiff failed to prove that the defendant was negligent, and the defendant entered evidence showing he had taken all possible care of the goods. The jury consequently decided for defendant.

King's Bench granted the plaintiff's motion for a new trial, and Jones says that the real reason, which the reporter did not mention, is that the defendant was guilty at least of ordinary negligence in permitting rats to do such mischief. W. JONES, *supra* note 13, at *105. However, the reported opinion of the court contradicts Jones. Noting that the plaintiff based his action on the defendant's negligence, Chief Justice Lee nevertheless concluded that the defendant, as a common carrier, was strictly liable: "every thing is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God, or the King's enemies; and a promise to carry safely, is a promise to keep safely." *Dale*, 1 Wils. at 282, 95 Eng. Rep. at 619-20. Consequently, evidence that the defendant "had taken all possible care of the goods" was not admissible. *Id.* at 281, 95 Eng. Rep. at 619. Moreover, Lord Dennison stated that "the declaration upon the custom of the realm is the same in affect with the present declaration." *Id.* at 282, 95 Eng. Rep. at 620. Although defendant's negligent handling of the goods gave rise to plaintiff's loss, he was strictly liable on the custom of the realm and not on a theory of breach of contract due to negligence. The court in effect substituted the correct tort theory of the action for the contract theory on which plaintiff's attorney incorrectly brought the suit.

This reading of the case is supported by the result in another case decided about the same time by Chief Justice Lee which is discussed in a note following *Dale v. Hall*. *Id.* at 282, 95 Eng. Rep. at 620. The case involved the loss of a puncheon of rum that was staved by the defendant shipmaster's crew when they lowered it into the hold of the ship. Although defendant proved that the crew used all possible care, Chief Justice Lee directed the jury to give its verdict for the plaintiff, which it did. Moreover, Sir Francis Buller interpreted *Dale v. Hall* in his nisi prius treatise as holding that "nothing is an excuse except the Act of God and the King's Enemies" in an action against a common carrier. F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 98 (Dublin 1768).

15. A. KIRALFY, *supra* note 13, at 155-56; C. FIFOOT, *supra* note 14, at 161. Fifoot correctly distinguished between the carrier's liability on his undertaking, which was limited to its terms, and carrier liability on the custom of the realm, which was strict liability. However, Fifoot also noted that if the carrier were sued in case without relying on the custom of the realm, that is, on his assumpsit, then the plaintiff had to prove negligent misconduct to succeed. C. FIFOOT, *supra* note 14, at 161. Kiralfy observes that although the carrier's liability by 1671 "was held to be strict and independent of fault . . . 'neglect' continued to be pleaded." A. KIRALFY, *supra* note 13, at 156.

a precision and clarity that was not characteristic of that earlier time. The reason for the historic lack of clarity is that the contract action of assumpsit and the tort action of negligence evolved from the same ancestral writ, trespass on the case. The theory of liability in assumpsit originally sounded in tort because assumpsit initially was brought for injuries caused by the negligent or careless performance of undertakings. Thus, John Baker and S.F.C. Milsom have collected and reprinted many cases in assumpsit for misfeasance or negligence dating back to *The Humber Ferry Case* of 1348.[16] These cases indicate that in early actions of assumpsit, plaintiffs were required to prove misfeasance to prevail.[17] Indeed, early cases of assumpsit appear to the modern reader very much like tort cases.

It is difficult to distinguish between tort and contract cases into the eighteenth century because the basis of the plaintiff's action and the defendant's liability in many cases of tort and contract was the latter's misfeasance, or failure to perform his undertaking with requisite care or skill. As early as 1374, a defendant's liability in assumpsit was predicated on his failure to act with the care or skill the community expected of him. For example, in one case, a surgeon was held liable for negligently treating a patient.[18] The surgeon not only failed to cure the plaintiff's wounded hand, he actually made it worse. Explaining the rule of decision by analogy, Chief Justice Cavendish declared:

> [I]f a farrier undertakes to heal my horse, and by his negligence or failure to cure it within a reasonable time the horse is made worse, it is right that he should be held guilty. But if he does all he can, or puts all his diligence into the cure, it is not right that he should be held guilty, even though the horse is not healed. There is a great difference between the two cases.[19]

Principles of neutral justice and fairness required that the defendant be held liable in the one case but not in the other. Consequently, a farrier who was sued in assumpsit was held liable in a 1597 case for "so improvidently and negligently treat[ing] the horse that it died" even though the plaintiff failed to show consideration for his undertaking. The court "ruled the declaration good, notwithstanding this [absence of consideration]; for the defendant's negligence is the cause of action; not the *assumpsit*."[20]

Although bailees and other defendants who practiced a common calling, such as surgeons, apothecaries, lawyers, farriers, and carpenters could be sued in assumpsit, they were often sued in actions on the case for negligence based on their failure to exercise requisite care, skill, or knowledge; this was especially

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16. J. BAKER & S. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750 358-77 (1986).

17. *See also* the fifteenth- and sixteenth-century cases reprinted in *id.* at 378-405; A. KIRALFY, *supra* note 13, at 139, 143.

18. Stratton v. Swanlone, Y.B. 48 Edw. III, fo. 6, pl. 11 (K.B. 1374) *reprinted in* J. BAKER & S. MILSOM, *supra* note 16, at 362.

19. *Id.* at 362. The writ was abated by judgment because the plaintiff failed to aver the place where the defendant undertook to cure her. Kiralfy identifies this case as the case that "established the rule that negligent treatment after an undertaking to heal was a ground of liability on case." A. KIRALFY, *supra* note 13, at 139.

20. Powtney v. Walton (1597) (manuscript available in Yale Law School Library) *reprinted in* J. BAKER & S. MILSOM, *supra* note 16, at 370.

true by the eighteenth century.[21] The underlying theory in such cases was negligence or carelessness.[22] Misfeasance was the gravamen of the action and of defendant's liability because the common law imposed on persons engaged in a common calling a duty of reasonable care and a standard of professional competence.[23] A non-professional was not held to these standards unless he expressly undertook to perform with such competence and care.[24] Moreover, prior to the seventeenth century, whether the suit was brought in case or in assumpsit, the plaintiff was required to plead and prove negligence or fault.[25]

The contract action of assumpsit originated in suits for injury arising from carelessness or misfeasance. Assumpsit for nonfeasance, that is, for failure to perform or to complete an undertaking, or what we would today consider the classic breach of contract action, was not established until the beginning of the sixteenth century.[26] The underlying theory of liability for nonfeasance, as for misfeasance, sounded in tort. The defendant was liable for deceit in promising to do something and then failing to perform as promised, and the plaintiff had to show actual injury.[27] The underlying theory of defendants' liability in assumpsit, whether for misfeasance or for nonfeasance, thus appears to have been the tort standard of fault. So closely related were tort and contract that A.K. Kiralfy concluded that "there is no hint on the records that actions for misfeasance had diverged in principle from actions for nonfeasance by 1700. This distinction between contract and tort in this field was still not clear in the eighteenth century."[28]

It was to clarify the law of bailments and carrier liability that prompted Lord Holt to write his lengthy opinion in the 1703 case of *Coggs v. Bernard*.[29] Actually, *Coggs* did not involve a common carrier. The defendant moved several hogsheads of brandy from one cellar to another as a favor for his friend, the plaintiff. He carelessly broke open one of the casks and gallons of brandy were lost. On a verdict for the plaintiff, the defendant moved in arrest of judgment on the grounds that he was not a common porter and had received nothing for his efforts. The Court of King's Bench rejected defendant's motion and held

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21. *Dr. Groenvelt's Case*, 1 Ld. Raym. 213, 214, 91 Eng. Rep. 1038, 1039 (K.B. 1697); Slater v. Baker & Stapleton, 2 W.G.K.B. 359, 361-62, 95 Eng. Rep. 860, 862-63 (K.B. 1767); Seare v. Prentice, 8 East 348, 352-53, 103 Eng. Rep. 376, 377-78 (K.B. 1807); 3 W. BLACKSTONE, COMMENTARIES *121; *Extract From a Book on Pleading* (1730) *reprinted in* J. BAKER & S. MILSOM, *supra* note 16, at 356; 2 N. DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 482 (1823); A. KIRALFY, *supra* note 13, at 137-46, 158-63; REPORTS, *supra* note 13, at 224-27; J. BAKER, *supra* note 13, at 336-38, 342; S. MILSOM, *supra* note 9, at 368-69, 393-94.

22. 3 W. BLACKSTONE, *supra* note 21, at *122. *See also, e.g., Dr. Groenvelt's Case*, *supra* note 21, at 214, 91 Eng. Rep. at 1039.

23. *See, e.g.*, 3 W. BLACKSTONE, *supra* note 21; 1 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND *409-10 (originally published 1762); Anonymous, 2 Salk. 522, 91 Eng. Rep. 445 (K.B. 1692); Shiells v. Blackburne, 1 H. Bl. 158, 161-62, 126 Eng. Rep. 94, 96 (K.B. 1789); Elsee v. Gatwood, 5 T.R. 143, 149-52, 101 Eng. Rep. 82, 85-87 (K.B. 1793); Seare v. Prentice, 8 East 348, 352-53, 103 Eng. Rep. 376, 377-78 (K.B. 1827); A. KIRALFY, *supra* note 13, at 137-45.

24. A. KIRALFY, *supra* note 13, at 137-38, 143.

25. *Id.* at 137, 143.

26. *Id.* at 138, 150; C. FIFOOT, *supra* note 14, at 164.

27. A. KIRALFY, *supra* note 13, at 138, 150; C. FIFOOT, *supra* note 14, at 332.

28. A. KIRALFY, *supra* note 13, at 138, 140, 146-50.

29. 1 Salk. 26, 91 Eng. Rep. 25, 3 Salk. 11, 91 Eng. Rep. 660, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).

him liable for his negligence even though his assumpsit, or undertaking, would not have been actionable for lack of consideration. The reason the defendant was liable in tort even though his undertaking was not actionable in assumpsit was explained by Lord Holt:

> [A]ssumpsit does not only signify a future agreement, but in a case such as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing.[30]

Holt made clear that the theory of the gratuitous bailee's liability was tort, or negligence as carelessness, rather than contract:

> [A] neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of trust undertaken voluntarily will be a good ground for an action.[31]

The bailee's misfeasance "is a deceit upon the plaintiff who trusted him [to use care], and that is the cause of action."[32] In other words, when one attempted to do something, the common law imposed a duty to perform the action in a careful manner even when it was done gratuitously and the obligor was not required by law to fulfill the obligation. Consequently, the legal basis of the bailee's liability was a breach of the duty of care due to negligence or fault.

Holt noted that the degree of care that the common law imposed varied from slight care to extraordinary care according to the nature of the bailment.[33] If the bailment was for the exclusive benefit of the bailor or was done gratuitously, then slight care was required of the bailee. If performed for the benefit of the bailee, then extraordinary care was the standard to which the bailee was held. If the bailment was for the mutual benefit of bailor and bailee, the most usual kind, then the standard was ordinary care. These varying standards of liability represent the court's adjustment of the bailor's and bailee's conflicting interests in the specific circumstances according to the same principles of fairness and justice in early cases of assumpsit.[34]

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30. *Id.* at 919, 92 Eng. Rep. at 113.

31. *Id.*

32. *Coggs*, 1 Salk. at 26, 91 Eng. Rep. at 25.

33. *Coggs*, 2 Ld. Raym. at 915-16, 92 Eng. Rep. at 111-12.

It is curious that Professor Horwitz overlooked these varying standards of care in his insistence that negligence originally meant nonfeasance for which defendants were strictly liable and not misfeasance or carelessness. The omission is particularly puzzling since he relied on the digest of English common law prepared by Sir John Comyns in 1785. M. HORWITZ, *supra* note 3, at 87. Comyns summarized the tort principles and the varying degrees of care required of different kinds of bailees recounted by Chief Justice Holt in *Coggs v. Bernard*. J. COMYNS, *supra* note 23, at *409-10. Comyns concluded that "if a Man lend his Horse, or other profitable Cattle to another *gratis*, he is bound to a strict Care, and therefore, if he neglects to take due Care of it, an Action upon the Case lies." *Id.* at *409. Comyns added that this action would not lie "if it be stolen without his Default or any Neglect." *Id.* Moreover, Comyns clearly expressed his understanding of negligence as something other than nonfeasance when he continued with a statement that distinguished "neglect" from nonfeasance: "if there be not any Neglect on the Defendant, an Action upon the Case does not lie against him, tho' he do not perform his undertaking." *Id.* at *410. If the standard of liability was strict liability for nonfeasance, the defendant would have been liable even though "there be not any neglect" on his part. The only plausible meaning of "neglect" and "negligence" in these cases is the failure to exercise a standard of care, and liability was understood to attach only if this standard was breached.

34. *See supra* notes 19-20 and accompanying text.

Lord Holt's analysis of the bailee's liability in tort was quickly acknowledged as the leading authority.[35] The most authoritative eighteenth-century treatise on bailments, Sir William Jones' *An Essay on the Law of Bailments*, published in 1781, was based on and elaborated Lord Holt's views. Thus, Jones defined "ordinary care" as that "which *every person of common prudence and capable of governing a family* takes of *his own* concerns . . . ."[36] Gross and slight negligence were greater or lesser deviations from ordinary care. English courts required bailors to prove that the loss of or injury to their goods while in the bailees' possession was due to the latter's negligence before they were permitted to recover. Thus, Lord Kenyon nonsuited the plaintiff in a 1795 action for damages arising from the theft of the contents of the plaintiff's trunk by the defendant innkeeper's servants because "[t]o support an action of this nature, positive negligence must be proved."[37]

The most important aspects of Chief Justice Holt's 1703 opinion for this study were his comments concerning the liability of common carriers, even though they merely elaborated a decision by King's Bench decided thirty years earlier.[38] Although other bailees were held to varying standards of care, the common carrier was strictly liable "against all events but acts of God, and of the enemies of the king."[39] Even if "the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable."[40] A defendant was strictly liable as a common carrier if he held himself out to transport the goods of any shipper for a reasonable compensation.[41] It was his status in law as a common carrier that was the basis of his strict liability on the custom of the realm.

The distinction between the tort liability of a bailee for carelessness and a common carrier's strict liability was illustrated in two cases decided toward the end of the eighteenth century. In the 1785 case of *Forward v. Pittard*,[42] the plaintiff sued for the value of twelve packets of hops that were destroyed through no fault of the defendant common carrier by a fire caused by the negligence of a third party. The court held the carrier liable even though he was free of any negligence. Lord Mansfield explained that, although a common carrier was liable on his contract only for a failure to exercise due care and diligence,

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35. Anonymous, 2 Salk. 523, 91 Eng. Rep. 445, note (a); F. BULLER, *supra* note 14, at 100. 1 J. COMYNS, *supra* note 23, at 208; 2 N. DANE, *supra* note 21, at 485. In his late nineteenth-century American treatise on contributory negligence, Charles F. Beach, Jr., stated that Lord Holt's opinion laid the foundation for the modern English law of bailment and was the leading authority on the law of negligence. C. BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 2 (1885). He traced the influence of Holt's *Coggs* opinion to the major treatises on bailments written by Sir William Jones in England and Justice Joseph Story in the United States, and to Chancellor Kent's commentaries on American law. *Id.* at 2-3. *See also, infra* note 109 for nineteenth-century American cases that relied on *Coggs* as authority.

36. W. JONES, *supra* note 13, at 6.

37. Finucane v. Small, 1 Esp. 314, 316, 170 Eng. Rep. 369, 369 (K.B. 1795).

38. Morse v. Slue, 1 Vent. 238, 86 Eng. Rep. 159 (K.B. 1672). This case is discussed *infra* at notes 53, 55-59. The importance of Lord Holt's opinion lies in its subsequent use as authority for common carrier liability.

39. Coggs v. Bernard, 2 Ld. Raym. 918, 92 Eng. Rep. 112 (K.B. 1703).

40. *Id.* at 918, 92 Eng. Rep. at 112.

41. Morse v. Slue, 1 Vent. 238, 86 Eng. Rep. 159 (K.B. 1672); Pagan, *supra* note 14, at 802 n.41.

42. 1 T.R. 27, 99 Eng. Rep. 953 (K.B. 1785).

the defendant's liability as a common carrier in this case was that of an insurer imposed by the custom of the realm:

> It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies.[43]

Mansfield noted that an act of God did not include acts of man such as a negligently caused fire. Rather, an act of God was "such act as could not happen by the intervention of man, as storms, lightning, and tempests."[44] Consequently, the carrier was strictly liable in tort for the loss.

However, if the loss occurred while the common carrier was storing the goods as a warehouseman and not in the capacity of a common carrier, he was liable only for ordinary care under the law of bailments. King's Bench based its judgment on this distinction in a 1792 case on facts very similar to those in *Forward*. A shipper brought an action against a navigation company for the loss of four packets of hops that were destroyed by fire through no fault of the defendants while they stored the hops in their warehouse until another carriage company could take them to their final destination. Plaintiff appealed a verdict for defendants and argued that the defendants were strictly liable upon the custom of the realm as common carriers because they had transported the hops to the warehouse in which they were destroyed. The court disagreed in an opinion that emphasized the unusual nature of the common carrier's strict liability:

> If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. *The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer*; and the reason given on the books (whether well or ill founded, is immaterial here) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants were not liable here . . . .[45]

The strict liability judges imposed on common carriers seems like a harsh rule. Their explanation for the rule illuminates their concept of tort. One reason was the public nature of the carrying trade. However, English judges emphasized certain policy goals as the main reasons for imposing strict liability. A primary policy objective was the protection of the public from undiscoverable fraudulent collusion between carriers and highway robbers. Thus, Holt defended strict liability:

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43. *Id.* at 33, 99 Eng. Rep. at 956. Lord Mansfield's opinion in *Forward* contradicts Horwitz's analysis of the common law. *Compare* M. HORWITZ, *supra* note 3, at 85-101, *with Forward*, 1 T.R. 27, 99 Eng. Rep. 953.

44. *Forward*, 1 T.R. at 33, 99 Eng. Rep. at 957.

In the fourteenth edition of Blackstone's COMMENTARIES, Edward Christian similarly commented on this case in 1807: "The carrier was liable for a loss occasioned by a fire, which the jury expressly found was not owing to any negligence on the part of the carrier." 3 W. BLACKSTONE, COMMENTARIES 165 n.7 (E. Christian ed. 1807).

45. Garside v. Proprietors of Trent & Mersey Navigation, 4 T.R. 581, 582, 100 Eng. Rep. 1187, 1187-88 (K.B. 1792) (emphasis added); *accord* Hyde v. Navigation Co. from the Trent to the Mersey, 5 T.R. 390, 101 Eng. Rep. 218 (K.B. 1793).

> As a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for also these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc. and yet doing it in such a clandestine manner, as would not be possible to be discovered.[46]

Lord Mansfield echoed Holt eighty years later when he explained that "the true reason" common carriers were held strictly liable is "for fear [that the negligence standard] may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil."[47] In addition to preventing collusion, this standard was also adopted "to prevent litigation . . . and the necessity of going into circumstances impossible to be unravelled . . . ."[48]

Although the fear of fraud and the avoidance of litigation and impossible burdens of proof remained the most commonly identified policy considerations underlying common carrier strict liability, eighteenth-century judges identified another important policy that was also served by this rule: inducing carriers to use greater care and diligence and thereby reducing the risk of loss. In a 1785 case, a common carrier argued he was not liable for damaged goods because the loss was caused by the negligence of a third party. The court rejected the common carrier's defense and held him strictly liable. This rule of strict liability was required by "good policy and convenience," Lord Ashurst explained, because

> [i]t will naturally lead to make carriers more careful in general. If this sort of negligence were to excuse the carrier, when he finds that an accident has happened to goods from the misconduct of a third person, he would give himself no further trouble about the recovery of them.[49]

Economic and commercial interests also motivated English judges to increase common carrier liability from negligence to strict liability. Sir William Jones explained in his 1781 treatise on bailments that English judges increased common carrier liability to promote fairness in business dealings during the "commercial reign" of Queen Elizabeth I.[50] In his authoritative mid-nineteenth-century American treatise on the law of common carriers, Joseph K. Angell similarly suggested that judges adopted strict liability not only to protect sixteenth-century shippers but "to favor and encourage commerce by guarding against the carrier's collusion and combination with thieves and robbers."[51] According to Angell, judges believed they promoted commerce and trade with neutral rules of law that fostered honesty and fair dealing in business relationships.

Judges in the sixteenth and seventeenth centuries increased the tort liability of common carriers to promote public policies based on moral principles of fairness and justice. They also extended common carrier liability to new groups

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46. Coggs v. Bernard, 2 Ld. Raym. 918, 92 Eng. Rep. 112 (K.B. 1703).
47. Forward v. Pittard, 1 T.R. 27, 99 Eng. Rep. 953 (K.B. 1785).
48. *Id.* at 33, 99 Eng. Rep. at 956.
49. Proprietors of Trent Navigation v. Ward, 3 Esp. 127, 131, 170 Eng. Rep. 562, 563-64 (K.B. 1785).
50. W. JONES, *supra* note 13, at *104.
51. J. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND BY WATER 71 (1849).

such as barge operators (in 1612),[52] masters of ships (in 1672),[53] and stage coach operators (1698).[54]

The judicial adoption of strict liability also resulted from the desire to accommodate the interests of shippers and carriers on the bases of fairness and the general welfare. This effort is evinced in the 1672 decision that extended common carrier liability to ship masters. The case was severely contested over two terms of King's Bench. A merchant sued the ship's master, but curiously not the ship's proprietors, for the loss of three trunks containing 400 pairs of silk stockings and 74 pounds of silk cloth which the ship was to take to Cadiz, Spain. While the ship was still in port, twelve men boarded it during the night, overpowered the four crewmen who were standing guard, and made off with the trunks. The merchant argued that the ship's master should be held liable even though the defendant proved "that there was no carelessness or negligent default in him."[55]

The trial judge, Chief Justice Hale, raised the issue of why the ship's master should be strictly liable as a common carrier for the robbery in port when he would not have been liable for a piracy committed at sea. Hale described the dilemma the case presented in this way: "If we should let loose the master, the merchant would not be secure. And if we should be too quick upon him, it might discourage all masters."[56] Observing "that [the] consequence of this case is great," he concluded that the ship's master was not a common carrier and directed a special verdict of not guilty because the defendant was not negligent.[57] On appeal, King's Bench initially "inclined strongly for the defendant, there being not the least negligence in him."[58] The court would have found him liable "in case there had been any default in him, or his mariners."[59] However, after two more arguments, King's Bench reversed itself. It concluded that the master of the ship was no different from a hoyman and should be strictly liable under the common law as a common carrier. The court apparently risked discouraging men from serving as ship masters in the interests of honesty and public safety.

Soon after they imposed strict liability on common carriers, English judges permitted them to mitigate somewhat the stringency of the common law. Although common carriers remained strictly liable upon the custom of the realm for lost or damaged goods, English judges permitted them to limit the amount of their liability by the terms of their agreements with shippers. English judges again changed the common law by recognizing the right of common carriers to

52. Rich v. Kneeland, Cro. Jac. 330, 79 Eng. Rep. 282 (K.B. 1612); W. JONES, *supra* note 13, at 107.

53. Mors v. Slew, 2 Keb. 866, 84 Eng. Rep. 548 (K.B. 1672). This case is also cited as Morse v. Slue, 1 Vent. 190, 86 Eng. Rep. 129; Mors v. Sluce, 1 Mod. 85, 86 Eng. Rep. 752; Morse v. Slue, 2 Lev. 69, 83 Eng. Rep. 453; Mors v. Slue, Raym. T. 221, 83 Eng. Rep. 115; Mors v. Slew, 3 Keb. 73, 84 Eng. Rep. 601; Mors v. Slew, 3 Keb. 113, 84 Eng. Rep. 624; Morse v. Slue, 1 Vent. 238, 86 Eng. Rep. 159; Mors v. Slew, 3 Keb. 137, 84 Eng. Rep. 638.

54. Lovett v. Hobbs, 2 Show. 127, 89 Eng. Rep. 836 (K.B. 1680).

55. Mors v. Sluce, 1 Mod. 85, 86 Eng. Rep. 752 (K.B. 1672).

56. *Id.*

57. *Id.*

58. Morse v. Slue, 1 Vent. at 190, 86 Eng. Rep. at 129.

59. *Id.*

limit their common law tort liability by contract. This right was judicially recognized in the seventeenth century in actions on the case, although it originated much earlier when the usual suit against common carriers was in detinue.[60]

Some of the same considerations of fairness and justice that prompted the change in common carrier liability from negligence to strict liability explain the judicial recognition of the carrier's right to limit his liability by contract. Judges in seventeenth-century England realized that shippers might defraud carriers as carriers might defraud shippers. How was a carrier to know the actual value of a sealed shipment in the event of loss unless the shipper stated its value at the time of delivery for shipment? Moreover, by the early eighteenth century, judges were beginning to think of common carrier strict liability as a common-law duty to insure safe delivery. Since the rate charged by carriers was determined in significant part by the risk the carrier assumed, English judges reasoned that it was fair to permit carriers to vary their rates according to the risk. The basic rate insured safe delivery to a certain maximum value. To insure safe delivery above this value, carriers charged additional amounts according to the nature and value of the goods. If shippers did not disclose the nature and value of the shipment, they assumed the risk of loss above the maximum amount covered by the basic rate. This seemed fair since, without this information, the carrier could not evaluate the risk of loss or determine appropriate safeguards. Nor could the carrier protect himself from being cheated by the shipper in case of loss.

This common-law development reflected an almost imperceptible change in the judicial understanding of the legal theory underlying common carrier liability. As the carrier's liability came to be understood as insurance, it became a matter of contract and negotiation in addition to a duty imposed by the custom of the realm.[61] In one sense, the common law permitted common carriers to contract out of strict liability. In another sense, the common law permitted carriers to limit their liability according to the rates they charged. Judges sought to accommodate the conflicting interests of shippers and carriers by adjusting legally imposed carrier liability on the bases of fairness and public safety. Since the carrier's reward was determined in significant part by the risk he assumed for safe delivery, English judges reasoned that it was reasonable to permit the carrier to vary his liability according to the risk he assumed as reflected in the premium he charged.[62] After all, this was the practice of insurance companies that had come on the scene.[63] This modification had the economic effect of spreading the cost of insurance among shippers by shifting the cost of safe de-

60. S. MILSOM, *supra* note 9, at 269; Pagan, *supra* note 14, at 806-14.

61. Gibbon v. Paynton, 4 Burr. 2299, 2301, 98 Eng. Rep. 199, 200 (K.B. 1769).

62. *See* Clay v. Willan, 1 H. Bl. 298, 126 Eng. Rep. 174 (C.P. 1789) (to hold carrier liable for safe delivery, carrier required "a penny insurance paid for each pound value" over £5 in addition to the carriage and booking rates).

63. Blackstone noted:

> The rate of carriage being not only a compensation for labour and the expense incurred, but also a premium of insurance for the safe delivery of the goods entrusted to the carrier, he may therefore make a special contract "exempting his liability" for money or other valuable articles above a certain sum unless he has notice of them, and is paid an extraordinary sum for the insurance.

3 W. BLACKSTONE, *supra* note 21, at *164.

livery from the common carrier to shippers through higher freight rates charged for more valuable shipments.

Nevertheless, English courts were reluctant at first to recognize the right of carriers to limit their liability. They initially put the burden of inquiring about the nature and value of packages and of expressly limiting the conditions of shipping goods on the common carrier. Thus, if a carrier accepted a package without condition and without inquiring about its contents, he was liable for its entire value if it were lost.[64] Indeed, the carrier was fully liable even though the shipper lied to the carrier about the nature and value of the shipment. King's Bench held in 1691 that "it must come on the carriers' [sic] part to make special acceptance."[65]

Carriers jumped on this subtle recognition of their right to limit their liability and followed the court's suggestion as to how they might do so. They specially accepted delivery of goods by informing shippers that they would be liable for the contents of sealed boxes only if they were informed of their nature and value. They expressly set their rates according to the nature and value of the shipment. Thus, when a box containing money was robbed from a carrier who had expressly limited his liability to the value of the shipment, King's Bench held the carrier strictly liable only for the £200 in cash which the shipper reported was in the sealed box when he delivered the box to the carrier, and not for the £450 which the shipper claimed the box actually contained after it had been stolen.[66] The court gave two reasons for this result. First, the court noted that "in this case there was a particular undertaking by the carrier for the carriage of £200 only, and his reward was to extend no farther than that sum."[67] The second reason was the obverse of the policy of fair dealing which led to common carrier strict liability in the first place. The court explained that since the plaintiffs had misinformed the defendant of the value of their shipment "to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward."[68]

English courts recognized early that when shipments consisted of sealed boxes, common carriers could be as vulnerable to fraud relating to the value of the boxes' contents as were shippers concerning lost or damaged goods. A shipper who misinformed the carrier of the nature and value of his shipment was just as guilty of fraud as the collusive carrier from whom the common law sought to protect the public. The carrier suffered the same evidentiary handicap in establishing the value of a shipment as the shipper who was forced to rely on a defrauding carrier for evidence to explain the loss of his goods. Consequently, the judicial recognition of the common carrier's right to limit his liability by contract and special acceptance of goods reflects the same policies of fair dealing, public safety, and minimizing loss based on moral principles of honesty, fairness, and justice that explain the judicial creation of common carrier strict

64. Kenrig v. Eggleston, Aleyn 93, 82 Eng. Rep. 932 (K.B. 1681).
65. *Id.*
66. Tyly v. Morrice, Carthew 485, 90 Eng. Rep. 879; Holt 9, 90 Eng. Rep. 903 (K.B. 1699).
67. *Id.* at 486, 90 Eng. Rep. at 880; Holt at 10, 90 Eng. Rep. at 903.
68. *Id.*

liability. If the shipper wanted the benefit of insured safe delivery that the law imposed on the common carrier to the full value of the shipment, it seemed only fair that he compensate the carrier for this risk. It also seemed only fair that the carrier be informed of the risk he was assuming, particularly since the rate he charged varied with the degree of risk he assumed.

Early in the eighteenth century, English courts made subtle modifications in the general rule of special acceptance that had significant consequences for the amount and the scope of common carrier liability. Certain rules were established to accomodate the security concerns of shippers and notice interests of common carriers. Because the carrier had the burden of specially accepting shipments, if the carrier accepted a box without disclaiming liability for any undeclared contents, he was liable for their value. Money was usually the undisclosed item. Since the courts recognized the right of carriers to specially accept shipments, if the carrier asked whether a shipment contained money and the shipper answered that it did not, or if the carrier accepted the box on condition that it did not contain money and it did, the carrier was not liable in case of loss. Moreover, if the premium for the money was greater than that for other goods in the box, and if the carrier was paid only for those other goods because he did not know the shipment contained money, the carrier was not liable for lost money.[69] The effect of this rule was subtly to shift from the carrier the burden of inquiring into the contents and value of the shipment and to accept it specially and to impose upon the shipper the burden of informing the carrier of its contents and value when a shipment contained valuables for which an additional charge was customary.

However, Common Pleas recognized in 1738 that disclosure of a shipment's contents "might be an encouragement for robberies rather than a hindrance."[70] The court consequently held a common carrier liable for the full value of a shipment which the carrier did not specially accept, even though the shipper misrepresented the shipment's value and contents. The court reasoned that the carrier could protect himself from being defrauded by an explicit special acceptance of the goods. This case manifested the difficulty that confronted English judges in their efforts to use law to promote honesty and fair dealing in the carrying trade.

In 1769, English judges recognized a significantly greater innovation in the rule of special acceptance: they permitted carriers to limit their liability by printed public notice. The rationale for this change sheds additional light on early notions of tort law and the intersection of tort and contract.

The theory underlying this rule was articulated by Sir James Mansfield[71] in his defense of a stage coach proprietor in an appeal from a jury verdict for the proprietor. Although the carrier's agent did not verbally inquire into the contents of or specially accept the shipment, the jury found that the proprietor had given the shipper adequate notice of his special acceptance through newspaper advertisements and handbills which stated that he would not be liable for

69. Titchburne v. White, 1 St. 145, 93 Eng. Rep. 438 n.1 (K.B. 1718).

70. Drinkwater v. Quenell, 7 Mad. 248, 249, 87 Eng. Rep. 1220, 1221 (K.B. 1738).

71. Sir James Mansfield should not be confused with Lord Mansfield whose real name was Mulroy.

money or jewels unless he was informed that shipments included these valuables. The evidence presented at trial showed that the plaintiff was a Birmingham merchant who frequently sent goods to London and that he knew of the defendant's policy and that the ordinary rate he paid excluded liability for valuables. In urging King's Bench to affirm the trial court's decision, Mansfield based his argument on considerations of fairness, justice, and public safety. The carrier's

> warranty and insurance is in respect of the reward he is to receive: and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expence of more guards or other methods of security: and therefore he ought, in reason and justice, to have a greater reward.[72]

Moreover, he reasoned, "if the owner of the goods has been guilty of fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner has been guilty of fraud."[73] The court agreed and adopted Mansfield's reasoning as the theory of its decision.

Permitting common carriers to limit their common-law liability by public notice reflected several considerations. Among them were the apparent reasonableness of carriers knowing what they were to transport, the need to protect carriers from potential fraud by shippers to which they were vulnerable by silent acceptance of goods, and the inconvenience of making a special contract for every parcel.[74] Common Pleas went so far as to hold that if the shipper did not comply with the requirements of the carrier's public notice there was no contract, and in case of loss the shipper could recover nothing.[75]

As business practices of the carrying trade became regularized and the industry evolved into a vital component of the English economy in the eighteenth and early nineteenth centuries,[76] English judges continued to accommodate the conflicting interests of shippers and carriers by adjusting legally imposed carrier liability on the bases of justice and fairness, while safeguarding the public's interest in light of its dependence on the transportation of goods. Although judges recognized the right of common carriers to limit their common-law liability by contract, they required the carrier to show that he had informed the shipper of his disclaimer of liability and the terms of carriage.[77] In light of the

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72. Gibbon v. Paynton, 4 Burr. 2298, 2300, 98 Eng. Rep. 199, 200 (K.B. 1769). Justice Buller also observed in another case that carriers usually insured their cargoes. Nevertheless, they were liable even if they did not insure them because failure to insure did not shift the risk of loss to the merchant shipper. Nor was the shipper obliged to insure his shipment. The carrier retained this duty because he "knows the degree of danger, and proportions his premium accordingly." Proprietors of Trent Navigation v. Ward, 3 Esp. 126, 132, 170 Eng. Rep. 562, 564 (K.B. 1785).

73. *Gibbon*, 4 Burr. at 2300, 98 Eng. Rep. at 200.

74. Riley v. Horne, 5 Bing. 217, 130 Eng. Rep. 1044 (C.P. 1828); Bignold v. Waterhouse, 1 Maule & Selw. 255, 105 Eng. Rep. 95 (K.B. 1813); Batson v. Donovan, 4 Barn. & Ald. 21, 106 Eng. Rep. 846 (K.B. 1820).

75. Harris v. Packwood, 3 Taunt. 264, 128 Eng. Rep. 105 (C.P. 1810).

76. *See* J. CHARTES, INTERNAL TRADE IN ENGLAND 1500-1700 (1977); E. PAWSON, TRANSPORT AND ECONOMY: THE TURNPIKE ROADS OF EIGHTEENTH CENTURY BRITAIN (1977).

77. Rowley v. Horne, 3 Bing. 2, 130 Eng. Rep. 413 (C.P. 1825); Munn v. Baker, 2 Stark. 226, 171 Eng. Rep. 638 (K.B. 1817); Gouger v. Jolly, 1 Holt 317, 171 Eng. Rep. 257 (K.B. 1816); Clayton v. Hunt, 3 Camp. 27, 170 Eng. Rep. 1294 (K.B. 1811); Butler v. Heave, 2 Camp. 415, 170 Eng. Rep. 1202 (K.B. 1810); Clarke v. Gray, 4 Esp. 177, 170 Eng. Rep. 682 (K.B. 1802).

judicial recognition of the carrier's power to limit his liability by printed public notice, the burden was not great in the usual situation involving merchant shippers. However, if the shipper was illiterate,[78] or if the shipper was literate but had not read the carrier's notice,[79] printed public notice was ineffective in limiting carrier liability. Moreover, ambiguity in the terms of the carrier's liability disclaimer voided it.[80] The terms least favorable to the carrier applied when the carrier stated inconsistent terms in different places such as in handbills, signs in the carrier's place of business, and in receipts.[81] Judicial insistence on proof that the shipper was adequately informed of the carrier's terms in cases in which notice was questionable manifests judges' concerns for fairness and justice in accommodating the conflicting interests of carriers and shippers.

English judges narrowed the power of carriers to limit their liability in other ways. Common-law strict liability applied when the goods were obviously more valuable than the £5 limit notwithstanding the carrier's printed disclaimer.[82] Further, courts delineated numerous exceptions to the carrier's exculpatory notices such that if the carrier lost or damaged the goods through negligence, he was liable for their full value, apparently because the shipper's nondisclosure of the goods' nature and value did not contribute to the carrier's carelessness.[83] The carrier also was liable for the full value of the goods if they were lost or damaged through the carrier's gross negligence.[84] English judges consequently circumscribed the power of carriers to limit their common-law liability through written public notice with the legal doctrines of notice, with the concepts of gross and ordinary negligence, and with the shipment's apparent value.[85]

Nonetheless, English courts permitted common carriers to reduce their liability to negligence by public notice and by special contract subject to these restrictions.[86] Carriers in England extended this judicially recognized power to

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78. Davis v. Willan, 2 Stark. 249, 171 Eng. Rep. 646 (K.B. 1817).

79. Kerr v. Willan, 2 Stark. 48, 171 Eng. Rep. 570 (K.B. 1817).

80. *See generally* Macklin v. Waterhouse, 5 Bing. 212, 130 Eng. Rep. 1042 (C.P. 1828).

81. Munn v. Baker, 2 Stark. 226, 171 Eng. Rep. 638 (K.B. 1817); Cobden v. Bolton, 2 Camp. 108, 170 Eng. Rep. 1097 (K.B. 1809).

82. Down v. Fromont, 4 Camp. 40, 171 Eng. Rep. 13 (K.B. 1814); Beck v. Evans, 3 Camp. 267, 170 Eng. Rep. 1377 (K.B. 1812).

83. Examples of such negligence include sending the goods by another carrier without authorization, Sleat v. Flagg, 5 Barn. & Ald. 342, 106 Eng. Rep. 1216 (K.B. 1822); Garnett v. Willan, 5 Barn. & Ald. 53, 106 Eng. Rep. 1113 (K.B. 1821); failing to use a seaworthy vessel, Lyon v. Mells, 5 East 428, 102 Eng. Rep. 1134 (K.B. 1804); and taking the shipment beyond its destination, Ellis v. Turner, 8 T.R. 530, 101 Eng. Rep. 1529 (K.B. 1800).

84. Examples of carrier gross negligence are leaving the goods with a drunken coachman after reaching their destination, Bodenham v. Bennett, 4 Price 31, 146 Eng. Rep. 384 (Ex. 1817); failing to prevent brandy from leaking out of a punctured cask after being informed of the leak, Beck v. Evans, 3 Camp. 267, 170 Eng. Rep. 1377 (K.B. 1812); using only one delivery man instead of the usual two, and leaving the delivery cart unguarded and vulnerable to theft, Smith v. Horne, 1 Holt 643, 171 Eng. Rep. 371 (C.P. 1817); failing adequately to secure a trunk to the coach, Brooke v. Pickwick, 4 Bing. 218, 130 Eng. Rep. 753 (C.P. 1827); delivering goods to wrong persons, Duff v. Budd, 3 Brod. & B. 177, 129 Eng. Rep. 1250 (C.P. 1822); Birkett v. Willan, 2 Barn. & Ald. 356, 106 Eng. Rep. 397 (K.B. 1819); Lowe v. Booth, 13 Price 329, 147 Eng. Rep. 1007 (Ex. 1824); Batson v. Donovan, 4 Barn. & Ald. 21, 106 Eng. Rep. 846 (K.B. 1820).

85. Pagan, *supra* note 14, at 822.

86. Nicholson v. Willan, 5 East 507, 102 Eng. Rep. 1165 (K.B. 1804). Carriers evidently turned to the courts after failing to lobby Parliament to enact statutes that would extend relief beyond that given in two eighteenth-

its fullest extent and virtually eliminated their common-law liability. By 1800, forty-nine domestic boat carriers in England exempted themselves from strict liability by public notice and explicitly limited their liability only to losses due to ordinary negligence of the master or crew, and then only to ten percent of the value of the goods up to the value of the vessel.[87] The shipper who wanted the carrier to assume his common-law liability had to make a special contract and pay extra freight to insure the goods.[88] English courts acquiesced and recognized the right of a water carrier to immunize himself from loss due to the vessel's sinking by a public notice which stated that all goods were carried at the owners' risk unless loss or damage was due to the actual default of the ship's master or crew.[89]

By the second decade of the nineteenth century, common carriers in England escaped their common-law liability in apparent derogation of the interests and policies which created it. English courts sanctioned this deviation from the common law as a logical extension of the contractual relationship between common carriers and shippers. Lord Ellenborough reasoned: "Since they can limit [liability] to a particular sum, I think they may exclude it altogether; and that they may say, we will have nothing to do with fire . . . [and that] they [may] make their own terms."[90] The court regretted that this was the law, for "it leads to very great negligence."[91] Consequently, English courts recognized this private contract right even though it violated the well-settled principle that whatever tends to encourage negligence, fraud, or crime should not be permitted by law because it is contrary to public policy.[92]

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century statutes. *Id.* at 513, 102 Eng. Rep. at 1167. The first of the statutes limited a water carrier's liability for losses occasioned by the crew's embezzlement to the value of the ship and cargo. An Act to Settle How Far Owners of Ships Shall be Answerable for the Acts of the Masters or Mariners, 1734, 7 Geo. 2, ch. 15, § 1. The second statute extended the 1734 limitation to exempt theft by anyone and, also exempted water carriers from loss by fire and from robbery of valuable goods even when the shipper informed the carrier in writing of the nature and value of such goods. An Act to Explain and Amend an Act, Made in the Seventh Year of his Late Majesty's reign, Intitled, An Act to Settle How Far Owners of Ships Shall be Answerable for the Acts of the Masters or Mariners; And for Giving a Further Relief to the Owners of Ships, 1786, 26 Geo. 3, ch. 86, § 1 & 2 [hereinafter Giving Further Relief].

87. Lyon v. Mells, 5 East 428, 430, 102 Eng. Rep. 1134, 1135 (K.B. 1804).

88. *See Lyon*, 5 East at 428, 102 Eng. Rep. at 1134; Nicholson v. Willan, 5 East 507, 102 Eng. Rep. 1165 (K.B. 1804).

89. Evans v. Soule, 2 Maul. & Sel. 1, 105 Eng. Rep. 283 (K.B. 1813). Parliament had exempted sea carriers in 1786 from liability for undeclared valuables that were lost or damaged by theft or embezzlement, Giving Further Relief, *supra* note 86, at § 3.

90. Maving v. Todd, 1 Stark. 59, 60, 171 Eng. Rep. 405, 405-06 (K.B. 1815).

91. *Id.* at 60, 171 Eng. Rep. at 406.

92. *See supra* notes 46-49 and accompanying text. Whether this doctrine produced the undesirable effect jurists feared is problematical. This change can be understood as simply shifting the cost of insurance from the carrier to the shipper by requiring the shipper to pay a surcharge in order to insure safe delivery. The carrier would still have an interest in exercising due care to hold down the cost of this insurance. This analysis assumes that shippers of valuable cargoes would be reluctant to use common carriers without such protection against substantial loss. This shift in the cost of insurance may actually have been the most economically efficient allocation of risk because it socialized the risk and the cost of insurance among those who were most interested, instead of allocating it to carriers who would then be forced to charge higher rates to all shippers. Regardless of the rule's efficiency, it is clear that this effect was not the reason that judges adopted the rule. English judges adopted the rule reluctantly, not because of any potential economic efficiency, but because of judicial precedent and the logic of legal theories and rules.

Although they viewed this change as contrary to public policy, English judges eventually permitted common carriers to immunize themselves from liability even if the loss was caused by the carrier's ordinary negligence. In an 1816 case, the defendant carrier had published a notice declaring that all shipments of items such as glass, household furniture, and toys were entirely at the risk of the owners.[93] The court held that this notice was legally binding on the shipper. Under the terms of the notice in question, the carrier would not have been liable even if one of his servants wantonly or wilfully destroyed the furniture entrusted to him.[94] The liability exclusion did not extend this far, however, for courts did not permit carriers to exempt themselves from gross negligence.[95]

English judges began to "lament that the doctrine of notice was ever introduced into Westminster Hall."[96] Yet, they felt constrained by precedent to enforce common carriers' contract rights even at the expense of public policy and England's commercial interests. For example, Lord Ellenborough declared: "I am very sorry for the convenience of trade, that carriers have been allowed to limit their common law responsibility. . . . But I feel myself bound by the decisions, that such notices, in cases where they apply, constitute a special contract between the parties."[97] Because of such sentiments, English judges beseechingly looked to Parliament to extricate them from the legal rules they had created which they believed undermined policies they sought to advance. Thus, Lord Ellenborough predicted that "some legislative measures upon the subject will soon become necessary."[98]

In 1830 Parliament enacted the Carriers' Act[99] which applied to land common carriers. Section One gave the carriers an automatic exclusion of liability for undeclared money, jewelry, art objects, and other valuables over £10 unless the loss was caused by the carrier's intentional wrong or felony.[100] Because the shipper was presumed to know the statute's disclosure requirement,[101] the carrier's common-law burden of proving actual notice was eliminated as a limitation on the carrier's power to contract out of liability. If the shipper failed to declare valuables or failed to pay the posted rate for goods of the nature and value of his shipment, he was barred from recovering for losses due to all degrees of negligence, even gross negligence.[102] However, if the shipper disclosed the nature and value of his shipment and paid the appropriate rate, the common law applied, rendering the carrier strictly liable for the lesser of the goods' ac-

93. Leeson v. Holt, 1 Stark. 148, 148, 171 Eng. Rep. 441, 441 (K.B. 1816).

94. *Id.* at 148, 171 Eng. Rep. at 441-42. *But see* Pagan, *supra* note 14, at 825 (suggesting that English courts did not recognize this right until the mid-nineteenth century "in response to the railway boom.").

95. *See supra* note 85 and accompanying text.

96. Smith v. Horne, 8 Taunt. 144, 144-46, 129 Eng. Rep. 338, 339 (C.P. 1818).

97. Down v. Fromont, 4 Camp. 40, 41, 171 Eng. Rep. 13, 14 (K.B. 1814).

98. *Id.* at 41, 171 Eng. Rep. at 14.

99. An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be Declared to them by the Owners thereof, 1830, 11 Geo. 4, ch. 68 [hereinafter Carriers' Act].

100. *Id.* at § 1.

101. *See* Hart v. Baxendale, 6 Ex. 769, 788-90, 155 Eng. Rep. 755, 764-65 (1851).

102. Hinton v. Dibbin, 2 Q.B. 646, 114 Eng. Rep. 253 (1842).

tual or declared value.[103] Section Six permitted carriers to contract out of liability for goods not covered in Section One as before with one important exception: The carrier was required to show that the shipper had agreed to the carrier's terms.[104] If the shipper rejected the carrier's terms, he could insist that the carrier ship his goods under the common-law duty of insured safe delivery, provided he disclosed the nature and value of the goods, and paid a reasonable surcharge. The carrier's refusal to ship the goods under these terms rendered him liable to the shipper in tort for wrongful refusal to carry.[105]

When the railroads acquired the economic power to force shippers to accept their terms, Parliament responded to public pressure and enacted the Railway and Land Traffic Carriers' Act in 1854.[106] This statute left the 1830 Act and the common-law right of carriers to contract out of strict liability largely intact. It restricted, however, the carrier's right to disclaim liability for negligence in two ways: It required the carrier to prove that the shipper signified his assent with his signature, and it subjected the assent to judicial review to determine if it was just and reasonable.[107] Whether the 1854 statute restricted the power of railroads in England to dictate the terms of carriage has been questioned by modern scholars.[108]

American courts adopted the theory, policies, and many of the rules of the English common law of common carriers.[109] American judges quoted from English decisions, such as Lord Holt's in *Coggs v. Bernard*,[110] which was thus recognized as the authoritative statement of common carrier strict liability. Moreover, the frequent and unremarkable use of negligence as carelessness in early American decisions also suggests that the fault principle of tort liability was as well-established in American law prior to the nineteenth century as it was in English law. Thus, a South Carolina judge charged a jury in 1790 that "whoever carries goods for hire, makes himself a common carrier under the custom and the law," and "the law was very clear, that nothing should excuse a common carrier, but the act of God or enemies."[111] The North Carolina Supreme Court two years later held that a defendant who was hired to carry goods from

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103. Carriers' Act, *supra* note 99, at § 9.

104. *Id.* at § 6.

105. *See, e.g.*, Carr v. Lancashire & Y. Ry., 7 Ex. 707, 715-16, 155 Eng. Rep. 1133, 1137 (1852).

106. An Act for the better Regulation of the Traffic on Railways and Canals, 1854, 17 & 18 Vict. ch. 31 [hereinafter Railway and Land Traffic Carriers' Act]. *See* Pagan, *supra* note 14, at 826.

107. Railway and Land Traffic Carriers' Act, *supra* note 106, at § 7; Peck v. Directors of N. Staffordshire Ry., 10 Clark 473, 508-09, 11 Eng. Rep. 1109, 1123-24 (H.L. 1863).

108. *See* Pagan, *supra* note 14, at 827-28.

109. Boyce v. Anderson, 27 U.S. (2 Pet.) 150, 155-56 (1829); Philadelphia & R. R.R. v. Derby, 55 U.S. (14 How.) 468, 485 (1852); Cole v. Goodwin & Storey, 19 Wend. 251, 256 (N.Y. Sup. Ct. 1838); Stockton v. Frey, 4 Gill. 406, 423 (Md. 1846); Thomas v. Boston & P. R.R. Corp., 51 Mass. (10 Met.) 472 (1845). *See* J. ANGELL, *supra* note 51, at 72-73, 80, 85-86, 99-101; 2 J. KENT, COMMENTARIES 609 (13th ed. 1884); J. STORY, BAILMENTS § 497 (9th ed. 1878). American lawyers and judges continued to rely on Lord Holt's opinion in Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703), well into the nineteenth century. *Derby*, 55 U.S. (14 How.) at 485; *Cole*, 19 Wend. at 263, 271-72; Hollister v. Nowlen, 19 Wend. 234, 238 (N.Y. Sup. Ct. 1838); J. ANGELL, *supra* note 51, at 70-73, 146-47. *Coggs* continued to be the standard authority in English courts as well. *See, e.g.*, Readhead v. Midland Ry., 2 L.R.-Q.B. 412, 421-22 (1867).

110. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).

111. M'Clures v. Hammond, 1 Bay 99, 100 (S.C. 1790). *But see* M. HORWITZ, *supra* note 3, at 85, 296 n.123 for a different interpretation of this case.

Virginia to Hillsboro, North Carolina was not "liable in all events, except for the acts of God, and public enemies" because "he had not undertaken to serve the public generally."[112] He merely undertook to carry the plaintiff's goods. Therefore, the court held, the defendant was not subject to what it described as "the political rule" laid down by Chief Justice Holt in *Coggs* for common carriers.[113] Rather, he was liable

> to the rule only which results from natural justice, which requires no more of him than common and usual prudence, and diligence in the performance of what he has undertaken, and does not subject him to answer for accidents which have not happened for want of that prudence and diligence.[114]

The tort theory underlying the court's decision was based on a standard of ordinary care. Chief Justice John Marshall in 1829 quoted from Sir William Jones' treatise on bailments as authority for "the ancient rule" of common carrier liability "that the carrier is liable only for ordinary neglect," but that this rule was changed to "the strict rule" after the reign of Henry VIII "as commerce advanced, from motives of policy."[115]

American judges expressed the same policy objectives in support of common carrier strict liability which earlier had led English courts to adopt this common-law rule.[116] In 1838, for example, New York Supreme Court Judge Cowans relied on Lord Holt's policy reasons for strict liability. Quoting Lord Holt and Common Pleas Chief Justice William Best, Cowans explained that this rule was " 'grounded upon great equity and justice,' "[117] because a liability standard of ordinary negligence would encourage common carriers " 'to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default in them' "[118] since the shipper's " 'witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.' "[119] The court refused to put ship-

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112. (Anonymous) v. Jackson, 2 N.C. (1 Hay) 19, 20-21 (1792).

113. *Id.* at 21.

114. *Id.*

115. Boyce v. Anderson, 27 U.S. (2 Pet.) 150, 155 (1829).

116. *See* Crosby v. Fitch, 12 Conn. 410 (1838); Roberts v. Turner, 12 Johns. 231 (N.Y. Sup. Ct. 1815); Eagle v. White, 6 Whart. 505 (Pa. 1841); Thomas v. Boston & P. R.R., 51 Mass. (10 Met.) 472 (1845); Shelden v. Robinson, 7 N.H. 157 (1834); Backhouse v. Snead, 5 N.C. (1 Mur.) 161 (1808); Walpole v. Bridges, 5 Blackf. 222 (Ind. 1839); Swindler v. Hilliard, 31 S.C.L. (2 Rich.) 286 (1846); Boyce v. Anderson, 27 U.S. (2 Pet.) 150 (1829).

117. Cole v. Goodwin & Storey, 19 Wend. 251, 273 (N.Y. Sup. Ct. 1838) (quoting Lord Holt in Lane v. Cotton, 12 Mod. 472, 481-82, 88 Eng. Rep. 1458, 1462-63 (K.B. 1721)).

118. *Id.*

119. *Id.* at 272 (quoting Chief Justice Best in Riley v. Horne, 5 Bing. 217, 220, 130 Eng. Rep. 1044, 1045 (C.P. 1828)). The same moral principles and social policies were offered by judges to explain why sheriffs were strictly liable for the escapes of debtor prisoners. A New Jersey trial judge succinctly explained the rationale in his charge to a jury:

> If it were otherwise, the creditor would be exposed to imposition and hardship. He must be constantly watching the conduct of the sheriff, and guarding against any collusion between him and the debtor; always liable to deceptions, which it would be impossible to thwart in their progress, or to unravel after their accomplishment.

Patten v. Halstead, 1 N.J.L. 277, 280 (1795). (English courts expressed the same rationale for this rule. *See* O'Neil v. Marson, 5 Burr. 2812, 2814, 98 Eng. Rep. 477, 478 (K.B. 1771); Crompton v. Ward, 1 Str. 429, 430, 93 Eng. Rep. 615, 616 (K.B. 1720) (argument of plaintiff); May v. Proby and Lumley, Cro. Jac. 419, 79 Eng. Rep. 358 (K.B. 1617). It was also assumed in England that an escape reflected poorly on the King. This served as

pers to impossible burdens of proof. Judge Cowans betrayed a pessimistic view of human-kind as well as a stringent sense of morality in explaining the need to retain this admittedly harsh rule: "It would be arrogant in any nation to claim a state of morals superior to those of England and especially to Scotland, where the same rigor prevails; still more arrogant, not to say profane, to claim a national perfectability so high as to rise above temptation."[120] He reinforced this moral perspective by repeating Lord Holt's insight into the difficulty of proving fraudulent collusion between roguish businessmen and robbers: the rule

> is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs require them to trust these [common carriers], that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them

without fear of discovery.[121] "There are no principles in the law better settled," Judge Cowan noted, "than that whatever has an obvious tendency to encourage guilty negligence, fraud or crime, is contrary to public policy. Such, in the very nature of things, is the consequence of allowing the common carrier to throw off

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another reason justifying strict liability. *Crompton*, 1 Str. at 430, 93 Eng. Rep. at 616.) Consequently, the New Jersey trial judge instructed the jury, "every escape not happening by the act of God; or the public enemies, was, in the eye of the law, considered a negligent escape. The law admits no other excuse." *Id.*

Horwitz relies on the rule of sheriff strict liability, and particularly this New Jersey case, in arguing that "negligence" originally was understood as nonfeasance for which the defendant was strictly liable. However, a sheriff's neglect of duty, or failure to do something the law required of him, was conceptually distinct from his careless performance of his duties. *See, e.g.*, 3 BLACKSTONE, *supra* note 21, at *163.

This distinction between sheriff nonfeasance and carelessness held important consequences for the amount of damages that could be claimed and the persons who could be held liable for escaped debtor prisoners. "For a voluntary Escape," Francis Buller noted in 1768, "an Action will lie against the Gaoler as well as against the Sheriff, because he is a wrong Doer; but for a negligent Escape it will only lie against the Sheriff." F. BULLER, *supra* note 14, at 94. The trial judge in *Patten v. Halstead* instructed the jury that if the escape were collusive or voluntary, then the sheriff was liable for the entire amount owed by the escaped judgment debtor. However, if it was "a negligent escape," the judge charged, then "the jury are not bound to make the original debt the measure of damages against the sheriff. They may take into consideration the circumstances of the case, and find such a measure of damages as the more or less favorable view of the facts which appear in evidence will warrant." *Patten*, 1 Cox. at 280-81. Consequently, Horwitz appears to be mistaken in concluding that this trial judge equated negligence and nonfeasance when he charged the jury that every nonvoluntary and noncollusive escape "not happening by the act of God, or the public enemies, was, in the eye of the law, considered a negligent escape. The law admits no other excuse." *Id.* On the contrary, when this statement is read along with the judge's other instructions, he is more accurately interpreted as saying that, although negligence or carelessness is the ordinary standard of liability, the need to protect the creditor from undiscoverable collusion between the sheriff and the judgment debtor requires that, in nonvoluntary escapes, the law will make the sheriff liable as if he were negligent whether or not he was negligent in fact.

Indeed, colonial and state legislatures in the eighteenth century adopted statutes that modified sheriff strict liability and brought it closer to a negligence standard of fault. *See, e.g.*, Johnson v. Macon, 1 Va. (1 Wash.) 4, 5-6 (1790) (interpreting a statute as requiring the jury explicitly to find that the prisoner's escape was "with the consent, or through the negligence of the officer" for the sheriff to be liable); Hooe v. Tebbs, 15 Va. (1 Munf.) 501, 509-10 (1810) (interpreting a 1792 statute as requiring the jury to find that the escaped prisoner could have been retaken had the sheriff made immediate pursuit to hold the sheriff liable for the escape). Like the rules that modified common carrier strict liability for injuries to goods, these statutes and their judicial application represent the efforts of legislators and judges to accommodate the conflicting interests of judgment creditors and sheriffs on principles of neutral justice and fairness by modifying sheriff strict liability.

120. *Id.* at 272.

121. *Id.* at 271-72 (quoting Chief Justice Best in Coggs v. Bernard, 2 Ld. Raym. 909, 918, 92 Eng. Rep. 107, 112 (K.B. 1828)). *See also* Hollister v. Nowlen, 19 Wend. 234, 240-41 (N.Y. Sup. Ct. 1838).

or in any way restrict his legal liability."[122] Like their English predecessors, American judges affirmed the concept of tort that the law could and should maximize public safety and minimize loss by placing the risk of loss on the person in the best position to avoid the loss.[123] The policies they attempted to promote were grounded on moral principles of justice and fairness.

Finally, American judges made explicit another policy reason for holding common carriers strictly liable for the goods they transported that also reflected the reasoning of English judges. This reason was grounded on the status of a common carrier as "a public servant with certain duties defined by law . . . [which] he is bound to perform . . . ."[124] Consequently, strict liability was the appropriate standard because of "the public character and absolute duties of the common carrier," or, in the words of later judges, because of their status as businesses affected with a public interest.[125] The crucial role common carriers played in the nation's economic life compelled judges to apply legal rules ensuring honesty and fair dealing in their relations with shippers which, in turn, would promote trade and commerce.

Courts in the United States paralleled those in England in permitting common carriers to exempt themselves from their common-law strict liability. The common law in every American jurisdiction eventually recognized the right of common carriers to limit contractually their liability over a certain amount unless the shipper declared the value and nature of the goods and paid the appropriate rate.[126] Also like the English, the American rule qualified the carrier's right to limit his liability by requiring that the shipper be informed of the notice. The carrier had the burden of proving that the shipper was fully apprised of the notice and its legal effect.[127]

Although all American jurisdictions permitted carriers to qualify their liability and to adjust their rates according to the value and nature of the goods, no American jurisdiction permitted carriers to limit the scope of their liability by mere public notice as did the English; nor were passenger carriers permitted to transport passengers' baggage at the passengers' risk by mere public notice.[128] As a matter of law, carriers were not permitted unilaterally to immunize

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122. *Id.* at 281. Nor was this idea original to this court: Chief Justice Holt used this theory in dissent from a ruling which held that a postmaster was not liable for mail that was lost by his subordinates' negligence. In addition to the policy considerations he stated in *Coggs v. Bernard* for common carrier strict liability, Holt argued that the postmaster should bear the liability because it would promote greater care and prevent fraud. Lane v. Cotton, 1 Ld. Raym. 646, 657, 91 Eng. Rep. 1332, 1338 (K.B. 1721).

123. *See, e.g.*, Thomas v. Boston & P. R.R., 51 Mass. (10 Met.) 472 (1845); Backhouse v. Sneed, 5 N.C. (1 Mur.) 161 (1808); Swindler v. Hilliard & Brooks, 31 S.C.L. (2 Rich.) 286 (1846).

124. Cole v. Goodwin & Storey, 19 Wend. 251, 281 (N.Y. Sup. Ct. 1838). *See also* Hollister v. Nowlen, 19 Wend. 234, 247 (N.Y. Sup. Ct. 1838).

125. *Cole*, 19 Wend. at 281. *See* Hollister v. Nowlen, 19 Wend. 234, 234 (N.Y. Sup. Ct. 1838). *See also* Munn v. Illinois, 94 U.S. (4 Otto.) 113 (1876); Nebbia v. New York, 291 U.S. 502 (1933).

126. *See generally, e.g.*, J. ANGELL, *supra* note 51, at 250; J. KENT, *supra* note 109, at 606-07. *See also* Orange County Bank v. Brown, 9 Wend. 85, 115 (N.Y. Sup. Ct. 1830).

127. New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 381-83 (1848); *Hollister*, 19 Wend. 234, 247-48 (N.Y. Sup. Ct. 1838); Beckman v. Shouse, 5 Rawle 179, 189 (Pa. 1835).

128. *New Jersey Steam Navigation Co.*, 47 U.S. (6 How.) at 382; *Hollister*, 19 Wend. at 247; *Cole*, 19 Wend. at 281; Jones v. Voorhees, 10 Ohio 145 (1840); Fish v. Chapman & Ross, 2 Ga. 349 (1847); Bennett v. Dutton, 10 N.H. 481, 487-88 (1839); Thomas v. Boston & P. R.R., 51 Mass. (10 Met.) 472, 479 (1845); Bean v. Green, 12 Me. 422, 423 (1835); Hale v. New Jersey Steam Navigation Co., 15 Conn. 539 (1843). However, the

themselves from their common-law duties and liabilities. American courts regarded this qualification of the carriers' liability as a departure from carriers' common-law duty of safe delivery which the shipper had a right to expect. To be legally binding, the carrier had to prove that the shipper had been informed of the qualification and had assented to it.

The Supreme Court of the United States, paraphrasing a New York Supreme Court opinion,[129] explained the American rule from the perspective of the carrier's important public function and the shipper's common-law rights. The Court observed that the common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned," and this assent could not be implied from a public notice.[130] The implication to be derived from a public notice, the Court reasoned, "is as strong that the owner intended to insist upon his [common-law] rights, and the duties of the carrier, as it is that he assented to their qualification."[131] Thus, the volitional and individualistic notion of contract cut in favor of the shipper as well as against him. The United States Supreme Court declared that the carrier had the burden of proving that the shipper assented, "and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."[132]

It appears that American courts were far more intent on preserving the common carrier's traditional common-law strict liability than were English courts. Several state courts in the first half of the nineteenth century refused to recognize that a common carrier had a common-law right to limit his liability even by express agreement. As late as the 1840s, the states of Connecticut, Georgia, Massachusetts, New Hampshire, New York, and Ohio unequivocally rejected the idea.[133] Although it did not explicitly decide the question, the Maine Supreme Court was not receptive to this right, though it seemed to recognize it. Maryland courts left the question open, and judges in Pennsylvania suggested in dicta that even though carriers had such a right, it should be construed narrowly because it was disfavored by public policy.[134]

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issue was undecided in Maryland; Pennsylvania decisions indicated support for the English rule; and South Carolina favored it. *See* Barney v. Prentiss & Carter, 4 H. & J. 317, 318-19 (Md. 1818); Atwood v. Reliance Transp. Co., 9 Watts 87, 88 (Pa. 1839); Bingham v. Rogers, 6 Watts & Serg. 495 (Pa. 1843); Singleton v. Hilliard, 32 S.C.L. (1 Strob.) 203 (1847).

129. In New York, the Supreme Court is a trial court and should not be confused with the highest court of appeal which, in the 1830s, consisted of the state's senators and was called the Court of Errors and Impeachment. The legislature removed the senate from the appellate judicial process in 1845 when it created an independent Court of Appeals which continues to serve as the state's highest court.

130. *New Jersey Steam Navigation Co.*, 47 U.S. (6 How.) at 382.

131. *Id.* at 383.

132. *Id.*

133. Hale v. New Jersey Steam Navigation Co., 15 Conn. 539 (1843); Fish v. Chapman & Ross, 2 Ga. 349 (1847); Thomas v. Boston & P. R.R., 51 Mass. (10 Met.) 472 (1845); Gould v. Hill, 2 Hill 623 (N.Y. Sup. Ct. 1842); Jones v. Voorhees, 10 Ohio 145 (1840).

134. Bean v. Green, 12 Me. 422, 423 (1835); Barney v. Prentiss & Carter, 4 H. & J. 317, 318-19 (Md. 1818); *compare* Atwood v. Reliance Transp. Co., 9 Watts 87, 88 (Pa. 1839); Beekman v. Shouse, 5 Rawle 179, 188-90 (Pa. 1835); Eagle v. White, 6 Whart. 505, 519 (Pa. 1841); Bingham v. Rogers, 6 Watts & Serg. 495 (Pa. 1843).

Traditional considerations of justice, fair dealing, and public policy were the reasons that American courts refused to permit common carriers to limit their common-law strict liability. "I venture to say," declared Judge Cowans of the New York Supreme Court in rejecting any deviations from common law, "that if we yield one inch to the course of modern English adjudication, its spirit is gone. The obligation of common carriers will become as remarkable for its laxity as it has heretofore been for its rigor."[135] He believed that a "relaxation of the common law rigor . . . [would open] the high road to fraud, perjury, larceny and robbery."[136] Therefore, "every relaxation in the common law, in relation to the duties and responsibilities of [common carriers is] . . . founded in bad policy and [is] detrimental to the general interests of commerce."[137] In addition, the New York Supreme Court emphasized anew the traditional concern arising from the shipper's difficulty of proving carrier negligence if carrier liability were reduced from that of an insurer of safe delivery.[138]

The Georgia Supreme Court declared in 1847 that technological advances in transportation, the advent of the railroad, and the increased use and importance of common carriers made adherence to the traditional common-law rules more imperative than ever:

> This is an age of railroads, steamboat companies, stage companies, locomotion and transportation. It is an era of stir—men and goods run to and fro—and common carriers are multiplied. The convenience of the people and safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers, than at any other period of the world's history. Steam, as a transporting power, has supplanted almost all other agencies and it is used for the most part by public companies or associations. It is very important that their liability should not only be accurately defined, but publicly declared.[139]

Noting that "notices, receipts and contracts, in restriction of the liability of a common carrier, as known and enforced in 1776, [were] void, because they contravene the policy of law," the court applied this American Revolution-era policy and rule in 1838 and refused to permit the common carrier to limit his liability.[140] The court concluded that protecting persons and property was all the more imperative in the new era of the railroad because of the danger presented by these new and powerful agents of transportation.[141]

Some American courts adhered to precedent and rejected legal trends occurring in England in the interests of promoting the traditional public policies of public safety, fair dealing, strict standards of due care, and minimizing the risk of loss. Judges who accepted this legal position expressed the belief that holding common carriers to their common-law strict liability was the best way to serve the commercial interests of the country.

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135. Cole v. Goodwin & Storey, 19 Wend. 251, 277 (N.Y. Sup. Ct. 1838).

136. *Id.* at 273.

137. Gould v. Hill, 2 Hill 623, 625 (N.Y. Sup. Ct. 1842).

138. Hollister v. Nowlen, 19 Wend. 234, 240-41 (N.Y. Sup. Ct. 1838).

139. Fish v. Chapman & Ross, 2 Ga. 349, 358 (1847).

140. *Id.* at 360.

141. *Id.* at 358.

Nevertheless, the United States Supreme Court declared in 1848 that common carriers did have the right to limit their strict liability by express written contract. Justice Nelson minimized the significance of this deviation from traditional common-law strict liability by suggesting that it merely shifted "the burden of proving that the loss was occasioned by the want of due care, or by gross negligence," to the shipper, "which would be otherwise in the absence of any such restriction."[142] His opinion disregarded the shipper's difficulty in meeting this burden.

The underlying theory of the carrier's right to limit his liability to a standard of negligence presumed that the relationship between the shipper and carrier was a mere private contractual relationship within which the parties had equal power to determine reciprocal rights and duties. Justice Nelson conceded that the common carrier was "a sort of public office" that performed "public duties," a status that required the carrier to prove that the shipper assented to the carrier's disclaimer of liability.[143] However, Justice Nelson nevertheless characterized the carrier's common-law liability as "extraordinary" and emphasized the private character of his services.[144] They "concern only, in the *particular instance*, the parties to the transaction, involving simply rights of property—the safe custody and delivery of the goods."[145] Consequently, Justice Nelson and the majority of the Court were "unable to perceive any well-founded objection to the restriction, or any stronger reasons for forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties."[146] The United States Supreme Court adopted the rationale which English courts had embraced decades earlier: that common carriers assumed extraordinary liability as insurers of safe delivery for which they should be compensated in proportion to the risk of loss. The Court's conception of common carrier strict liability changed from a common-law duty inherent in the carrier's service for which he was compensated by his ordinary rate, to an extraordinary insurance service for which he should be compensated beyond his ordinary rate according to the risk he assumed. This change in the common carrier's liability reflected a judicial understanding of the shipper and common carrier relationship as one of contract between private parties.

The Court also relied on policy considerations in justifying its recognition of this common-law right of common carriers to restrict their liability by special agreement. In the Court's opinion, the common-law standard of strict liability imposed on common carriers too great a hardship when the goods were of great value or were subject to extra risk and when losses occurred "by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at

142. New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 343, 384 (1848).

143. *Id.* at 382.

144. *Id.* at 381.

145. *Id.* (emphasis added). Justice Wright of the New York Supreme Court, echoing Justice Nelson, made explicit the conclusion that was implied here: "In any particular instance, the extraordinary duties annexed to the *carrier's employment do not concern the public, but only the parties to the transaction.*" Moore v. Evans, 14 Barb. 524, 528 (N.Y. Sup. Ct. 1852) (emphasis added).

146. *New Jersey Steam Navigation Co.*, 47 U.S. (6 How.) at 382.

sea, [and] accidental fire."[147] The courts should permit carriers to exempt themselves "from liability for accidental losses, where it can be safely done," because this exemption would enable the carriers to reduce their rates of compensation.[148] Rate reduction, the Court reasoned, would proportionally relieve "the transportation of produce and merchandise from some of the burden with which it is loaded."[149] It was only fair that shippers with the highest risks should bear the highest costs of insured safe delivery.

Almost all states eventually accepted the Supreme Court's 1848 recognition of a common carrier's right to exempt itself from strict liability.[150] As more state courts recognized this right, judges also found additional reasons for doing so. A New York Supreme Court overruled state precedent in 1851 because transportation had become interstate in scope and required uniform rules "throughout the commercial world" to avoid "the great inconvenience that must result from having different and hostile rules on the subject."[151] Since the law was settled in England and most of the United States, New York changed its common law to bring it into conformity. Reflecting notions of individualism and privatism associated with nineteenth-century liberalism, judges willingly permitted "parties by special agreement, to waive rules of law, and liabilities introduced and enforced for their own benefit."[152] If shippers wanted to incur the risk of insurance, or if a carrier exempted such risks unless the shipper paid a higher fare, judges could not see "what the public have to do with [their] . . . negotiations, nor why . . . [they] should not be permitted to make a valid contract, with such conditions and stipulations as . . . [they chose]."[153]

Judges did not think that permitting carriers to adjust their liability by contract would lead carriers to "indifference or carelessness, or want of vigilance in protecting shipments confided to their care."[154] They thought this problem could be avoided by shifting legal presumptions and burdens of proof. They reasoned that the shipper need only prove the shipment and the loss or damage to make out a prima facie case of negligence, which then shifted to the carrier the burden of proving that he used due diligence and care.[155] This redistribution of burdens of proof also obviated the other judicial concern supporting a rule of strict liability that shippers would be unable to prove carrier negligence. Judges concluded that the common law would continue to promote due care among carriers because they would be required to convince a jury that they had used diligence and faithfulness in handling the goods and thus were not at fault.

By the middle of the nineteenth century, many American judges no longer felt the need to protect the public from predatory and dishonest common carriers. This attitudinal change reflected a different concept of the carrying trade,

147. Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 360 (1873).
148. *Id.* at 360.
149. *Id.*
150. *See* Parsons v. Monteath & Hazard, 13 Barb. Ch. 353, 358 (N.Y. Sup. Ct. 1851).
151. *Id.* at 359.
152. *Id.* at 360.
153. *Id.*
154. *Id.*
155. *Id.*

of common carriers, and of the shippers who relied on them. Judges believed that the typical shipper was engaged in a trade or business and was familiar with the carrying trade. "Men of business generally know what they are doing and what is for their interest,"[156] Judge Welles declared less than fifteen years after his judicial brother on the New York Supreme Court, Judge Cowans, vehemently rejected this reasoning.[157] Judge Wright, also of the New York Supreme Court, agreed the following year that, "in this age of civilization," the "tendency to encourage negligence, fraud or crime, is no greater than in many other business occupations of life."[158] Arguing that the transportation of goods was a private business matter in which the public had no interest, that the public no longer required protection from unscrupulous carriers as it once did, and that reducing the carrier's liability to a negligence standard would not induce negligence, Judge Wright confidently concluded that he was

> unable to appreciate those overwhelming considerations of public policy which demand, that because an individual is . . . a [common] carrier, he should have the common law liabilities fixed on him in all cases, even though the owner of the goods be willing to contract specially with him as a private person.[159]

Judge Wright's concept of American business and transportation in 1852 reflected the era of the small individual entrepreneur which the railroad was rendering obsolete. His model of the American economy was one of free and open competition: the transportation "business is open to all who may choose to engage in it; and like many other[s] of the industrial occupations of life, it is full to repetition."[160] Consistent with this vision of a competitive economic order, he posited business relationships between shippers and carriers of equal bargaining power in which the latter could not impose upon the former. "There can be no such thing as a combination amongst those engaged in the business of carrying, by exacting special agreements to throw off their common law obligations," Judge Wright confidently declared.[161] Within his conception of a freely competitive economy comprised of relatively equal entrepreneurs, "[t]he owner of goods may still insist that they shall be carried, with the common law responsibilities attached; and this will be always so, unless the risk be diminished by express stipulations of the parties."[162]

However, Judge Wright described a different economic order that would justify courts in refusing to allow common carriers to contract out of their common-law strict liability and in holding them strictly liable as insurers of safe delivery. Perhaps as a warning to the incipient railroad industry, he suggested that strict liability would be an appropriate common-law standard of carrier liability if the law conferred extraordinary privileges on carriers, or if the office

156. *Id.*
157. *See supra* notes 135-38 and accompanying text.
158. Moore v. Evans, 14 Barb. 524, 528 (N.Y. App. Div. 1852).
159. *Id.* at 529.
160. *Id.* at 528-29.
161. *Id.* at 529.
162. *Id.*

"could be enjoyed but by few, with the tendency to a monopoly of the particular business."[163]

In 1838, Judge Cowans had expressed the fear that, if the courts recognized carriers' right to exempt themselves from liability, there would be no limit to the exemption. His fears were realized in New York by the 1850s. Although New York courts initially refused to permit carriers to exempt themselves from all liability, they eventually changed their view.[164] By 1862, the New York Court of Appeals, in a five to three decision, permitted carriers to exempt themselves even from liability for the gross negligence of their employees and agents.[165] Reflecting nineteenth-century liberalism and privatism, the court's rationale was predicated on a competitive economic order in which the public interest was best protected by every person exercising his right to decline any special contract limiting carrier liability by paying the rate charged by the carrier to insure safe delivery. Consequently, if the shipper declined to pay that premium, he must submit to the carrier's liability-limiting terms, however onerous.[166] By 1873 seven states either followed or favored the New York rule: Connecticut, Illinois, Maryland, Michigan, Missouri, New Jersey, and Vermont.[167]

The state courts that rejected this rule reflected a different economic model, and emphasized the public character of common carriers, which they believed compelled them to adopt other rules to promote fair dealing and justice in the relationship between carriers and shippers. For example, the Ohio Supreme Court simply declared that public policy forbade common carriers from exempting themselves from liability for their negligence and their employees' negligence because they were engaged in a public service and possessed a public character by virtue of the powers and privileges which the state had conferred upon them.[168] The Ohio court also took judicial notice of the new public danger arising from the increasing prevalence of railroads and the corporate form of organization. "In this state, . . . railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods."[169] If carriers were permitted to immunize themselves from the negligence of their employees, then "[t]his doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty."[170] The Maine Supreme Court similarly reasoned that to recognize this immunity "would remove the principal safeguard for the preservation of life and property in such conveyances."[171] By the early 1870s, courts in twelve

163. *Id.* at 528.

164. *See* line of cases beginning with Dorr v. New Jersey Steam Navigation Co., 4 Sand. 136 (N.Y. Super. Ct. 1850); Stoddard v. Long Island R.R. Co., 5 Sand. 180 (N.Y. Super. Ct. 1851); Welles v. New York Cent. R.R., 26 Barb. 641 (N.Y. App. Div. 1858); Smith v. New York Cent. R.R., 29 Barb. 132 (N.Y. App. Div. 1859); Wells v. New York Cent. R.R., 24 N.Y. 181 (1862); Perkins v. New York Cent. R.R., 24 N.Y. 196 (1862).

165. Bissell v. New York Cent. R.R., 25 N.Y. 442 (1862).

166. *Id.* at 448-50.

167. *See* Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 367 (1873).

168. Welsh v. Pittsburgh, F.W. & C. R.R., 10 Ohio St. 65, 75-76 (1869); Davidson v. Graham, 2 Ohio St. 131, 139 (1853).

169. *Welsh*, 10 Ohio St. at 75.

170. *Id.* at 76.

171. Sager v. Portsmouth, S. & P. & E. R.R., 31 Me. 228, 238 (1850).

states refused to recognize a common-law right of carriers to immunize themselves from liability for the negligence of their employees: Alabama, Delaware, Georgia, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Ohio, Pennsylvania, and South Carolina.[172]

The divisions among state judges seem to be attributable to different understandings of the nature of the American economy and economic relationships, of the nature of common carriers as public or private enterprises, and of the consequent public need for the intervention of the courts to adjust the conflicting interests of shippers and carriers through law. Why judges had different ideas about these subjects is an intriguing question that is beyond the scope of this Article.

In 1873, the United States Supreme Court addressed the question of common carrier liability for employee negligence in an opinion written by a former railroad attorney, Justice Joseph P. Bradley.[173] The Court refused to permit common carriers to contract out of all liability, basing the decision on federal common law. Bradley asserted that "on a question of general commercial law, the Federal courts administering justice in [a state] have equal and coordinate jurisdiction with the courts of that State."[174] Additionally, he said, with state courts divided on this question, the Justices of the Supreme Court "should not be satisfied" unless their decision was based on satisfactory grounds and "sound principles of law."[175]

The Court decided to hold railroads and other common carriers liable for the negligence of their employees in order to promote public safety and to minimize the risk of loss. Bradley asserted that the New York rule had jeopardized public safety. It had resulted in increased accidents and in diminished care and vigilance among common carriers.[176] Holding carriers liable for employee negligence was necessary because this liability would provide them with "the most stringent motive for the exercise of carefulness and fidelity in [their] trust."[177] Moreover, the status of common carriers required this result because they exercised important public functions which the law required them to perform with requisite care and diligence, "an object essential to the welfare of every civilized community."[178] This objective would be subverted if a carrier were permitted to waive his liability "in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants[.]"[179] The Court was not persuaded by the railroad's argument that it was unfair to hold corporations liable for the negligence of employees over whose actions corporate officers could exercise no control. It also rejected the railroad's claim that the Court's refusal to permit the railroad to contract out of liability for employee negligence constituted " 'a most palpable invasion of personal

172. *See* Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 368-71 (1873).
173. *Id.*
174. *Id.* at 367-68.
175. *Id.* at 368.
176. *Id.*
177. *Id.* at 377-78.
178. *Id.* at 377.
179. *Id.* at 378.

right.' "[180] In stark contrast to the formalism of other judicial decisions of the late nineteenth century, the Court emphatically insisted that "[i]t is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business."[181] To decide otherwise "would be subversive of the very objective of the law" as the carrying trade was then conducted.[182]

The Court grounded its decision on public policy, moral principle, and a conception of business realities that reflected industrial development in the 1870s. Bradley denied that shippers were equal in bargaining power to carriers. On the contrary, carriers enjoyed such superior bargaining power that they could dictate the terms of carriage. If the carrying trade were truly competitive and shippers had real freedom of choice among carriers, Bradley opined, the courts would not prevent shippers from assuming the risk of loss due to negligence.[183] But the shipper did not have alternative choices nor the power to bargain freely. Rather than a freely competitive industry, "[this] business is mostly concentrated in a few powerful corporations," Bradley noted, "whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept."[184] Analogizing to fiduciaries whose positions of trust enabled them to take undue advantage, Bradley insisted that the contracts of common carriers "must rest upon their fairness and reasonableness."[185] It was fair, just, and reasonable to permit carriers by contract to limit their liability as insurers of safe delivery because "[t]he improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule."[186] However, to permit common carriers to exempt themselves from negligence would "be adverse (to say the least) to the dictates of public policy and morality."[187]

One might ask why exemptions from liability for negligence are adverse to public policy. It was not merely because of the disparity in bargaining power between common carriers and shippers, for courts did not recognize this as a reason for intervention in other business transactions. Of greater importance were the role and function played by common carriers, together with their contribution to the welfare of society, which gave the public such a vital interest in the way common carriers conducted their business. The whole business community was affected by them. The liability they assumed or attempted to avoid affected public safety and economic life. Because of "the inequality of the parties, the compulsion under which the customer is placed, and the obligations of

180. *Id.* (quoting Dorr v. New Jersey Steam Navigation Co., 11 N.Y. 485, 493 (1854)).
181. *Id.* at 378.
182. *Id.*
183. *Id.* at 379.
184. *Id.* at 380.
185. *Id.*
186. *Id.*
187. *Id.*

the carrier to the public,"[188] courts must "stand firmly by those principles of law by which the public interests are protected."[189] The Court concluded "[t]hat it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."[190] By refusing to follow the path taken by the courts of England earlier in the century, the Supreme Court rejected a rule and supporting legal theory that would have substantially immunized common carriers from liability even though it logically followed from judicial precedent. The Court saw its role as protecting the public weal from the enormous power that railroads were acquiring.

American courts, like their English counterparts, modified the common law to permit common carriers to limit by contract their strict liability for safe delivery of goods. Nevertheless, they did not permit common carriers to exempt themselves from liability when judges believed that "such exemption is not just and reasonable in the eye of the law."[191] Thus, American judges modified common carrier liability in the nineteenth century based on judicial notions of justice and fairness that were consistent with and, in many instances, the same as those of English judges in earlier centuries. They consciously used the common law of tort to protect the public from what they perceived to be unfair and inequitable business practices arising from the concentration of economic power in the railroads. These judges responded to nineteenth-century changes in economic structure and relationships by modifying and applying tort rules on the basis of traditional tort principles to promote traditional policies.

III. Common Carrier Liability for Injuries to Passengers

Although the common law held common carriers of goods liable as insurers of safe delivery, it did not impose such a strict standard of liability on passenger carriers for the safety of passengers. This seemingly anomalous distinction made sense in light of the theory of tort liability. Common carriers of goods were held liable as insurers because goods were inanimate objects over which the owner completely lost control, and the carrier acquired exclusive control, when the owner delivered them to the carrier. Consequently, the common law held carriers of goods strictly liable for safe delivery to prevent them from defrauding shippers by pretending that they were lost or stolen, and to remove the difficult problems of proof confronting shippers who were forced to rely on carriers for evidence showing the cause of loss or damage.

Passengers, on the other hand, are not inanimate. While on the carrier, they can care for themselves, "exercising that vigilance and foresight, in the maintenance of their rights, which the owners of goods cannot do, who have entrusted them to others."[192] Moreover, because they have volition, passengers, unlike inanimate objects, can bring about their injuries by their own actions. To

188. *Id.* at 381-82.
189. *Id.* at 379.
190. *Id.* at 384.
191. *Id.*
192. Ingalls v. Bills, 50 Mass. (9 Met.) 1, 7 (1845).

hold a carrier strictly liable for an injury caused by the passenger was considered unjust and was not permitted by law.[193] Consequently, contributory negligence was a bar to passenger recovery.[194] Nonetheless, if a carrier's negligence created a dangerous situation and alarmed passengers, courts were lenient in determining whether the passengers' behavior in the circumstances was reasonable.[195]

Therefore, the common law required some element of fault on the part of the carrier in causing the injury to hold him liable. Nevertheless, not much fault was required. The common law imposed on common carriers of passengers a duty to use "*the highest degree of care which a reasonable man* would use" in the circumstances.[196] The reason for this high standard is that the carrier "has, for the time being, committed to his trust the safety and lives of people, old and young, women and children, locked up as it were, in the coach or rail-car, ignorant, helpless, and having no eyes, or ears, or power to guard against danger, and who look to him for safety in their transportation."[197] This high common-law standard of utmost care emanated from the same policy concerns underlying those for common carriers of goods: the protection of public safety and the avoidance of unnecessary harm by encouraging care and diligence.

The case recognized by the United States Supreme Court in 1839 as establishing the rules and principles of passenger carrier liability was *Aston v. Heaven*[198] decided by King's Bench in 1797.[199] In *Aston*, the passenger attempted to persuade the court that a passenger carrier, like a common carrier of goods, should be strictly liable as an insurer of safe delivery even when the carrier had not been negligent. The court reasserted the fault standard of liability that it had proclaimed twelve years earlier with respect to common carriers of goods in *Forward v. Pittard*.[200] The *Aston* court rejected the plaintiff's theory and held that the passenger carrier was not liable for injuries to passengers "where there has been no negligence or default" on the part of the proprietor or his agents.[201] The court explained that an injured passenger's cause of action was "founded entirely in negligence"[202] and "stands on the ground of negligence alone."[203] However, it added that the carrier "is answerable for the smallest

193. Hull v. Connecticut River Steamboat Co., 13 Conn. 319, 326 (1839).

194. *See infra* notes 214-19 and accompanying text.

195. *See, e.g., infra* notes 214-16 and accompanying text.

196. Derwoit v. Loomer, 21 Conn. 245, 253 (1851).

197. *Id.* at 253-54.

198. 2 Esp. 533, 170 Eng. Rep. 445 (K.B. 1797).

199. Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181, 191-92 (1839). The first case brought in England by a passenger against a passenger carrier for personal injury was White v. Boulton, 1 Peake's 113, 170 Eng. Rep. 98 (K.B. 1791). Ingalls v. Bills, 50 Mass. (9 Met.) 1, 8 (1845); J. ANGELL, *supra* note 51, at 485. *White* referred to the common law and not to admiralty law, and merely decided that a mail carrier which also carried passengers was "bound to carry them safely and properly." *White*, 1 Peake's at 113, 170 Eng. Rep. at 98 (K.B. 1791).

200. 1 T.R. 27, 99 Eng. Rep. 953 (K.B. 1785); *see supra* note 47 and accompanying text.

201. *Aston*, 2 Esp. at 533, 170 Eng. Rep. at 445.

202. *Id.* at 534, 170 Eng. Rep. at 446.

203. *Id.* at 535, 170 Eng. Rep. at 446.

negligence."[204] The common-law obligation of passenger carriers was to safely convey passengers "as far as human care and foresight could go."[205]

The standard of utmost care was equally applicable both to actions in assumpsit[206] and tort actions for negligence.[207] The passenger carrier's duty of utmost care extended far beyond the immediate circumstances in which the passenger's injury occurred:

> The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; and a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any of them, the duty of the coach proprietors is not fulfilled and they are answerable for any injury or damage that happens.[208]

The law required the proprietor to do everything "that human prudence can suggest for the security of the passengers."[209]

The United States Supreme Court, citing *Aston*, accepted this rule in 1839 and affirmed that passenger carriers were liable in tort for "the least negligence, or want of skill, or prudence."[210] Passenger carriers were liable if the passenger's injury was, "in any degree, attributable to a want of skill or care" on the part of the carrier or his employees.[211] The Court therefore upheld the jury instructions of a trial judge who stated that the common law imposed on passenger carriers a duty to act "with the utmost prudence and caution."[212] The common-law duty of due diligence and care required carriers to do all that was humanly possible to provide for the safe conveyance of passengers.

Courts in England and in the United States stringently applied this standard of utmost care and diligence and sometimes reached extreme results. In an 1808 case, for example, a stage coach proprietor in England was held liable for injuries sustained by a woman "outside" passenger who was knocked off the roof of the stagecoach on which she was riding as the coach passed under the gateway of an inn to which the coach was transporting her.[213] The driver had asked her to get off the roof because the clearance was very narrow; indeed, it was only twelve inches. She refused because the road was muddy. Lord Ellenborough ruled that the driver's warning was insufficient to apprise the plaintiff of her peril. The driver should have told her that she had to get down because she would endanger her life if she remained on the roof. The driver's failure to

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204. *Id.*

205. Christie v. Griggs, 2 Camp. 79, 81, 170 Eng. Rep. 1088, 1088 (C.P. 1809).

206. *Id.*

207. Hyman v. Nye, 6 Q.B.D. 685 (1881); Bretherton v. Wood, 3 Br. & B. 54, 129 Eng. Rep. 1203 (C.P. 1821).

208. Crofts v. Waterhouse, 3 Bing. 319, 321, 130 Eng. Rep. 536, 537 (C.P. 1825).

209. *Id.*

210. Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181, 190 (1839).

211. McKinney v. Neil, 16 F. Cas. 219, 224 (C.C.D. Ohio 1840) (No. 8,865); Maury v. Talmadge, 16 F. Cas. 1182, 1186 (C.C.D. Ohio 1840) (No. 9,315) (driver held to "the strictest care, and the most unremitting vigilance").

212. *Stokes*, 38 U.S. at 190.

213. Dudley v. Smith, 1 Camp. 167, 170 Eng. Rep. 915 (K.B. 1808).

give adequate warning breached his duty of utmost care for which the coach proprietor was liable. The jury awarded plaintiff £100 in damages.

Judicial leniency towards passengers was manifested in another English case in which the passengers may have contributed to the injury.[214] The stage coach driver lost control of the horses when a defective coupling rein broke, and the coach crashed into a pile of wood. The plaintiff and his wife were injured when they jumped from the coach fearing that it would overturn. Had they remained on the coach with the other passengers they would have escaped injury. The court ruled that the coach proprietor was liable even though the plaintiffs' actions contributed to their injuries if the driver's negligence, want of skill, or misconduct created a situation that placed plaintiffs in certain or imminent peril or created a reasonable apprehension of impending danger. The trial judge charged the jury that, if they found that the plaintiffs' actions were rash or imprudent, they were not entitled to recover. However, if the jury concluded that the plaintiffs were "placed in such a situation as to render what [they] did a prudent precaution," or if their action "was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted" in the circumstances, they were entitled to recover.[215] In short, unless the jury found that the plaintiffs acted rashly, the carrier was liable even though the proximate cause of plaintiffs' injuries was their unnecessarily jumping from the coach, because the carrier was at fault in creating the danger. The jury awarded plaintiffs £300 in damages.[216]

American courts decided similar cases in similar ways. The Illinois Supreme Court applied essentially the same rule against a railroad in two cases that presented very similar facts. Although the court remanded the cases to determine whether the plaintiffs' negligence had caused their injuries, the rule was the same, and the jury had to decide the same issues.[217] A Connecticut case offers an extreme example of judicial leniency toward railroad passengers. That state's supreme court affirmed a damage award to a plaintiff who was injured as she alighted a moving railroad car after it had stopped to discharge and pick up passengers.[218] The train started to move before she was able to get off, and she was thrown from the car and sustained injuries from which she became permanently disabled and lame. The question put to the jury was whether the passenger had used reasonable care in trying to leave the car after it had begun to move. If she had, the judge instructed the jury, then the railroad was liable because of the stringent standard of utmost care that the law imposed upon passenger carriers. The railroad attempted to avoid this standard of liability by arguing that it was not a common carrier of passengers since its charter did not authorize it to carry passengers. The court refused to let the defendant escape liability on this technicality and ruled that even if the railroad was not authorized by its charter to be a passenger carrier, it held itself out to be a common

214. Jones v. Boyce, 1 Stark. 402, 171 Eng. Rep. 540 (K.B. 1816).

215. *Id.* at 405, 171 Eng. Rep. at 541.

216. *Id.*

217. Galena & C.U. R.R. v. Yarwood, 17 Ill. 509 (1856); Galena & C.U. R.R. v. Fay, 16 Ill. 558 (1855).

218. Fuller v. Naugatuck R.R., 21 Conn. 557 (1852).

carrier of passengers, it was carrying passengers, and, therefore, it was a passenger carrier in fact. Resolving this and other procedural issues in favor of the plaintiff, the court presented the case to the jury to decide whether the railroad was in the slightest degree negligent in creating a dangerous condition which caused the plaintiff's injury. The jury awarded the plaintiff 200 dollars.

The United States Supreme Court also refused to permit a railroad to escape liability for injuries to a stockholder who was riding as an invited guest and not as a paying passenger.[219] Justice Grier reminded the railroad that its liability did not derive from contract, but from common-law tort. He therefore rejected the railroad's argument that it should be liable only for gross negligence for injuries to persons riding as guests of the railroad with a sweeping affirmation of the common-law duty of utmost care:

> When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross."[220]

The Court also rejected the railroad's contention that it was not liable for the negligence of an employee whose disobedience to an order caused the injury. Justice Grier emphasized the increased necessity to apply this high standard of care to railroads because of the great danger posed by their enormous power:

> Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting [of] such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence. . . . If such disobedience could be set up by a railroad company as a defence, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety.[221]

As American courts consciously used rules of law to protect shippers of goods from the disparate economic power of railroads, so they also consciously used rules of law to protect passengers from their destructive physical power.[222]

English and American courts imposed equally exacting standards of liability for defects in the vehicles used to carry passengers. The common law required passenger carriers to provide road-worthy carriages, sea-worthy vessels, and machinery in good repair. Thus, King's Bench declared that every passenger carrier "warrants to the public, that his stage-coach is equal to the journey it undertakes."[223] By the early nineteenth century, the sources of this duty were

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219. Philadelphia & R. R.R. v. Derby, 55 U.S. (14 How.) 468 (1852).

220. *Id.* at 486.

221. *Id.* at 487. In addition to the federal courts, every state except New York followed this rule. New York permitted carriers to contract out of liability for injuries to goods and passengers caused by their employee's negligence. C. BEACH, *supra* note 35, at 183-84.

222. *See supra* notes 169-72, 176-82 and accompanying text.

223. Bremner v. Williams, 1 Car. & P. 414, 416, 171 Eng. Rep. 1254, 1255 (C.P. 1824).

either contract, if plaintiff brought an action in assumpsit, or tort, if the suit was an action on the case. Passengers whose injuries were caused by defects in the carriage often brought assumpsit. Although this implied warranty did not impose strict liability, the carrier was liable for defects that were discoverable by human inspection no matter how extraordinary the inspection required to discover it. The common law required stage coach proprietors "to examine [the coach] previous to the commencement of every journey," and their failure to do so rendered them "guilty of gross negligence."[224] Consequently, a defendant stage coach proprietor was held liable for a passenger's injury even though the injury was caused by a defect which could not be discovered by an ordinary inspection. Moreover, the coach had been repaired just a few days before the accident, and the proprietor had examined the coach that morning, although not before this second journey on which the injury occurred. The failure of a coach proprietor to examine the coach for defects before each journey was held to be gross negligence in England and in the United States. Whether the suit was brought in case for negligence or in assumpsit for breach of an implied warranty of road worthiness, the theory of liability was the same for both.[225]

The duty of care to which courts held passenger carriers for the road worthiness of their vehicles was just short of strict liability. Courts sometimes found carriers liable even though they conformed to statutory standards of safety. For example, a stage coach proprietor in England was held liable in 1803 for injuries sustained by a passenger when the coach overturned because it had too many passengers riding on the roof even though the number of passengers did not exceed that allowed by an Act of Parliament for such coaches.[226] King's Bench found that, although the kind of coach in question could accommodate the number of passengers, the specific coach on which the passenger was riding evidently was not sufficient. Because the proprietor was "bound by law to provide sufficient carriage for the safe conveyance of the public," he was held liable for the negligent breach of this common-law duty even though he was not liable under the statute.[227]

Although the circumstances of this case seem to indicate that the court was applying a standard of strict liability, a close reading of the opinion reveals otherwise. Lord Ellenborough reasoned that the fact that the defendant was liable if he exceeded the statutory maximum did not mean that he was not liable if he did not exceed the maximum. The defendant had the duty of showing that the specific carriage involved was strong enough to carry the number of passengers riding on it when the accident occurred.[228] This the defendant failed to show.

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224. *Id.* at 416, 171 Eng. Rep. at 1255.

225. *See* Hyman v. Nye, 6 Q.B.D. 685, 687 (1881) (while carrier is not strictly liable, he is liable for injuries caused by "defects which care and skill can guard against"); Ingalls v. Bills, 50 Mass. (9 Met.) 1, 15 (1845) (carriers are liable for injuries resulting from "a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination").

226. Israel v. Clark & Clinch, 4 Esp. 259, 170 Eng. Rep. 711 (K.B. 1803).

227. *Id.* at 260, 170 Eng. Rep. at 712.

228. *Id.*

One could read into Lord Ellenborough's brief discussion the implication that the plaintiff made out a prima facie case of negligence which then shifted to the defendant the burden of proving that the injury was not caused by the carriage's insufficiency. This doctrine was explicitly set out a few years later.[229] The passenger in this case was injured when the coach's axle-tree snapped. The court held that injury to the passenger was prima facie evidence of carrier negligence which shifted the burden of proof to the carrier to show that he did all that was humanly possible to avoid the accident which caused the injury. Although coach proprietors did not insure the safety of passengers as they did the safety of goods, Lord Ellenborough declared, they were nonetheless bound by law, "as far as human care and foresight could go . . . [to] provide for their safe conveyance."[230] The jury found for the defendant because the weakness in the axle-tree was not discoverable by inspection of any kind.

Although the common-law duty to provide road-worthy vehicles and seaworthy vessels did not impose strict liability, the passenger carrier was liable for defects that were discoverable on inspection no matter how extraordinary the inspection required to discover it. For example, evidence in an 1833 case revealed that an axle snapped because of a hairline crack in the iron which was not discernible under an ordinary inspection because the iron was enclosed by four blocks of wood bound together by iron clamps. Moreover, defendant proved that the driver had inspected the exposed parts of the axle just before the journey and had found no defect. Nevertheless, the trial judge left to the jury the question whether the defendant had exercised due diligence in providing a safe coach. The jury found that he had not and gave a verdict for the plaintiff in the amount of £500.[231]

The court of common pleas affirmed and held that coach proprietors were liable for all defects in their vehicles that could be seen at the time of construction, even though the defect was out of sight and not discoverable upon ordinary examination by the carrier after the carrier had acquired the vehicle.[232] The carrier was also liable for defects that might develop afterward if they were visible even though they were hidden. Applying this rule to the case at bar, the court held that the injury was due to "an original defect in construction" for which the carrier was liable.[233] Judge Alderson defended this rule on the basis of the public policy of promoting public safety by requiring parties to behave with due care. He observed that, "if the Defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without a remedy."[234] The court's rationale also embraced the principles of imposing liability on the party in the best position to avoid the injury and of requiring a party to compensate for injuries caused by his fault.

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229. Christie v. Griggs, 2 Camp. 79, 170 Eng. Rep. 1088 (C.P. 1809).
230. *Id.* at 81, 170 Eng. Rep. at 1088.
231. Sharp v. Grey, 9 Bing. 457, 131 Eng. Rep. 684 (C.P. 1833).
232. *Id.* at 459-60, 131 Eng. Rep. at 685.
233. *Id.* at 460, 131 Eng. Rep. at 685.
234. *Id.*

In a case brought in 1844 by a passenger injured when the train he was riding in derailed as it ran over improperly fastened rails, Lord Chief Justice Dedman explained the rule in terms we would today describe as a theory of *res ipsa loquitur*.[235] Instructing the jury that they must be satisfied that the injury was caused by the carrier's negligence, he stated that:

> [I]t having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendant, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give.[236]

The jury found for the plaintiff. Queen's Bench affirmed.[237]

The stringent judicial application of the passenger carrier's duty of utmost care in providing road-worthy vehicles rendered the standard almost indistinguishable from strict liability. As late as 1881, Queen's Bench made this point as it explained that a passenger carrier

> is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whil[e] the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to sh[o]w that the breakdown was in the proper sense of the word an accident and not preventable by any care or skill. If he can prove this . . . he will not be liable; but no proof short of this will exonerate him.[238]

Although the court acknowledged that "reasonably fit denotes something short of absolutely fit," it observed that "[t]he difference between the two expressions is not great."[239] The risk of defects in the carriage, the court held, "so far as care and skill can avoid them, ought to be thrown on the owner of the carriage."[240] The reason for placing this risk on the carrier is that the passenger trusted the carrier to provide a fit and sufficient carriage, and the carrier had it within his power to see to it that the carriage was fit and to charge passengers enough to maintain it in proper order.[241] Thus, because, the carrier was in the best position to avoid the harm, the law placed the risk of loss on the carrier.

American courts applied the same rules and theory of liability with the same distribution of burdens of proof in cases involving defective equipment. Passenger carriers were held by the common law to the "utmost degree of care and skill in the preparation and management of the means of conveyance."[242] The passenger assumed some risks of travel, "those casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard."[243] However, if the plaintiff showed that he was a passenger and that he was injured, he made out a prima facie case of carrier negligence; to escape

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235. Carpue v. London & B. Ry., 5 Q.B.D. 747 (1844).
236. *Id.* at 751.
237. *Id.* at 757.
238. Hyman v. Nye, 6 Q.B.D. 685, 687 (1881).
239. *Id.* at 688.
240. *Id.*
241. *Id.*
242. McKinney v. Neil, 16 F. Cas. 219, 223 (C.C.D. Ohio 1840) (No. 8,865).
243. *Id.*

liability, the carrier then had to show that the injury was unforeseeable or impossible to guard against.[244]

This stringent common-law duty of care was defended by American judges on policy grounds of public safety. The Massachusetts Supreme Judicial Court noted in 1845 that the issue of passenger carrier liability was of great importance because so many of the state's citizens were engaged in businesses that required them to travel to different locations by public conveyance.[245] Although the court acknowledged that "speed seems to be the most desirable element in modern travel," it nevertheless insisted that "the law points more specifically to the security of the traveller."[246]

However, the Massachusetts court rejected the plaintiff's contention that passenger carriers warranted safe carriage just as common carriers of goods insured the safe delivery of goods. The case before the court involved an injury caused by a hidden defect in a stage coach's axle-tree. The court held that negligence was the standard of liability "most consonant with sound reason, or good common sense, as applied to so practical a subject."[247] It explained that holding carriers to an absolute warranty of the safety of their vehicles would require them to warrant the work of others over whom they had no control. This was not practical because this liability would fall not on the manufacturer, on whom it should fall for undiscoverable defects, but on the person who purchased the vehicle for use. Fairness and justice precluded shifting the risk of loss from the manufacturer to the carrier in such cases. Rather, these considerations required passenger carriers "to use the utmost care and diligence in providing safe, sufficient, and suitable [equipment] to prevent those injuries which human care and foresight can guard against."[248] Consequently, if an injury was caused by a hidden defect which could not be disclosed by "the most vigilant oversight, then the proprietor is not liable for this injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."[249]

American courts, like the courts of England, stringently applied this standard. In an 1856 case, the Illinois Supreme Court upheld a decision in which a coach proprietor was held liable for injuries to a passenger when the axle broke because of frost.[250] On appeal, the defendant argued that an act of God caused the accident, which was a defense even for a common carrier of goods. However, the appeals court rejected this theory and observed that the jury could have found that defendants might have prevented the frost from damaging the axle-tree if they had exercised the utmost care for which they were liable. The court declared that passenger carriers had a duty "to do all that human care,

244. *Id.*; *see also* Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181, 190-93 (1839) (injury to passenger prima facie evidence of driver's negligence); Ware v. Gay, 28 Mass. (11 Pick.) 106, 112 (1831) (injury to passenger caused by coach wheel falling off is prima facie case for plaintiff).

245. Ingalls v. Bills, 50 Mass. (9 Met.) 1, 6 (1845).

246. *Id.* at 14.

247. *Id.*

248. *Id.* at 15.

249. *Id.*

250. Frink v. Potter, 17 Ill. 405 (1856).

vigilance, and foresight can . . . to guard against and prevent accidents, and consequent injury to passengers. They are held to strict care and vigilance . . . and are liable for the consequences of slight neglect or want of care."[251] The Pennsylvania Supreme Court similarly held a railroad liable for failing to construct the windows on its passenger cars so that riders would be prevented from extending their arms, and thus preventing them from smashing their arms against the wall of a bridge.[252] The court explicitly rejected the idea that railroads generally should be liable for such precautions. However, it held the railroad liable in this case because the railroad proprietors knew that this particular road was so narrow that it was dangerous for passengers to rest their arms on windowsills. The railroad also knew that this practice was "a notorious custom in railway cars."[253] The court made the railroad responsible for knowing its passengers' customs and habits and providing for them when it was aware of circumstances that required special precautions.

Judicial resolution of the clash of policies and values of a related aspect of passenger carrier liability sheds light on the goals and theories underlying nineteenth-century tort law. Passenger carriers who were held liable for injuries arising in part from the poor condition of roads and equipment that were in the care of other parties attempted to pass on the cost of these injuries to the parties responsible for maintaining them. For example, in an 1840 case, a stage coach proprietor was required to pay 2300 dollars in damages plus costs to a passenger who was injured when the coach overturned. The accident occurred because the condition of the road was poor, the coach was overloaded, and the driver negligently drove the coach outside the ruts in the road.[254]

The stagecoach proprietor then sued the road company responsible for maintaining the road on the theory that it was the real wrongdoer because its negligence created the poor road conditions that caused the accident. Opposing counsel based their respective arguments on moral principle and public policy. The plaintiff's attorney argued that, as between two wrongdoers, morality required that liability be apportioned to the party who committed the real wrong and to whom alone guilt attaches—the road company.[255] The defendant's attorney, the man who would become President Abraham Lincoln's Attorney General, Henry Stanbery, argued that even if his client were equally at fault, to permit the stagecoach proprietor to recover from the road company would endanger passenger safety because it would induce carriers to diminish the care and diligence with which they transported passengers.[256] This argument per-

251. *Id.* at 409.

252. New Jersey R.R. v. Kennard, 21 Pa. 203 (1853).

253. *Id.* at 206. *See also* Curtis v. Drinkwater, 2 B. & Ad. 169, 109 Eng. Rep. 1106 (K.B. 1831) (malconstruction of coach or improper position of luggage is carrier's negligence). But, if a passenger stuck his hand out of the car window while passing a bridge contrary to the general regulations of the company and particular caution of the conductor, it was evidence of gross contributory negligence which would bar recovery. Laing v. Colder, 8 Pa. 479 (1848). In Massachusetts, a passenger who was injured because he was riding with his arm out the window was deemed guilty of "want of due care" which barred recovery from the railroad on which he was riding. Todd v. Old Colony & F.R. R.R., 85 Mass. 18, 21-22 (1861).

254. Maury v. Talmadge, 16 F. Cas. 1182 (C.C.D. Ohio 1840) (No. 9,315).

255. *Id.* at 198-204.

256. *Id.* at 205.

suaded the Ohio Supreme Court to refuse to apportion liability among the joint tortfeasors. It cautioned that, "if the court should permit carriers to recover the damages from the owners of bad roads, for injuries consequent upon the negligence of such carriers, there would be very little safety for passengers."[257]

Refusing to pass on to another negligent party the carrier's liability for its own negligence was consistent with the theory of contributory negligence. It also was consistent with the moral principle that required the wrongdoer to compensate the injured party for injuries for which the wrongdoer was culpable, and the policy of promoting due care and diligence in avoiding injury by placing the risk of loss on the party in the best position to avoid the injury.

Moreover, courts refused to allow railroad carriers to escape liability for injuries to their passengers caused by the negligence of another railroad's employees.[258] The Massachusetts Supreme Judicial Court affirmed a jury verdict for a passenger who was injured when the car in which she was riding collided with another train because of the negligence of the switchman, an employee of another railroad. Chief Justice Lemuel Shaw declared that "the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary for the safety of passengers."[259] Consequently, the railroad carrier was liable for the injury even though the person who caused the injury worked for another railroad.

However, a carrier could recover for damages to its equipment caused by the failure of another party to maintain the track as it was bound to do.[260] The plaintiff in this 1849 case operated a railroad over tracks owned and maintained by the defendant and sued to recover the loss of a railcar destroyed when it derailed because of the defendant's negligent maintenance of the road. The jury awarded the plaintiff 283 dollars, and the Pennsylvania Supreme Court affirmed the judgment, declaring that "[t]he plaintiff's right to damages rests on the universal principle that he who, to the injury of another, neglects a duty that by law he ought to perform, is liable to compensate the injury."[261] Noting that "this principle is as old as the common law itself,"[262] the court asserted that this rule must "be most stringently enforced against railroad corporations, whose slightest inattention to the duties they assume may be, and frequently is, attended with the most frightful results."[263] It observed that the loss of life and property resulting from the indifference of railroad employees was an almost daily occurrence and admonished "that the public safety calls for a strict adherence to a rule suggested by considerations of policy and humanity."[264] Unlike the Ohio carrier who was asking for apportionment from a joint tortfeasor, the

257. Talmadge v. Zanesville & Maysville Rd. Co., 11 Ohio 197, 219 (1842).
258. McElroy v. Nashua & L. R.R., 58 Mass. (4 Cush.) 400 (1849).
259. *Id.* at 402.
260. Cumberland Valley R.R. v. Hughes, 11 Pa. 141 (1849).
261. *Id.* at 145.
262. *Id.*
263. *Id.* at 146.
264. *Id.*

Pennsylvania plaintiff in this case was asking to be compensated for its own loss caused by the defendant's negligence.

In 1880, the United States Supreme Court emphatically affirmed passenger carrier liability for utmost care and diligence in providing safe equipment even when the carrier did not operate and control it.[265] The Pennsylvania Company sought to escape liability for injuries sustained by a passenger who was riding in a Pullman car. The Pullman Company, and not the railroad, owned the car; Pullman hired the conductor and porter who exercised exclusive control over the car, and Pullman was the exclusive agent for the sale of tickets to ride in the Pullman car which were required in addition to the regular fare. The Court nevertheless held the Pennsylvania Company liable for an injury that occurred in the Pullman car when a sleeping berth fell on a passenger's head. Observing that the sleeping car constituted a part of the train, it declared that

> [t]he law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey.[266]

The railroad was liable for any defect in any of the rail cars that "was discoverable upon the most careful and thorough examination."[267] Any negligence or failure on the part of the Pullman Company's conductor and porter to discover such defects was chargeable to the railroad. "The law will . . . presume that the conductor and porter," the Court explained, "exercised [exclusive] control [over the Pullman car] with the assent of the railroad company."[268] Consequently, the Pullman Company's "conductor and porter, were, in law, the servants of and employees of the railroad company."[269] Their negligence, therefore, was chargeable to the Pennsylvania Company.

The rules of passenger carrier liability for injuries to passengers formulated by the courts of England in this industry's incipiency at the end of the eighteenth century were applied by the courts of the United States through the nineteenth century.[270] Passenger carriers were held to a standard of utmost care and were found liable for the slightest negligence. Moreover, the determination whether the precautions taken by carriers had met this abstract standard in the circumstances of specific cases was made by juries, not judges, who held carriers liable if there was any possibility of avoiding the injury, however remote or improbable. As for judges, rather than lessening this high duty of extraordinary care with the advent of railroads, they more rigorously insisted that carriers do all that was humanly possible to avoid passenger injuries because of the significantly greater danger these machines presented to the safety of their passengers. The inherited moral principles and public policies underlying tort law

265. Pennsylvania Co. v. Roy, 102 U.S. 451 (1880).
266. *Id.* at 457.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*; Railroad Co. v. Pollard, 89 U.S. (22 Wall.) 341 (1874).

served as insurmountable bastions against the attempts of passenger carriers to avoid the stringent liability that the common law imposed on them. Judges developed the rules of passenger carrier liability for injuries to passengers and applied these rules to dispense neutral justice, to promote public safety, and to enhance the care and diligence of passenger carriers in avoiding injuries.

IV. Tort Liability for Injuries to Third Parties

Common carrier liability for injuries to third parties was part of the evolution of the more general rules of tort liability for injuries to strangers. Liability in these cases was predicated on some duty owed to the stranger other than one arising from the contractual relationship of the parties or the status or public office of the defendant. The following discussion will show that moral principles and social policies promoting public safety and fairness explain early tort rules of liability for injuries to strangers. It will also show that tort was a fault-based theory of law by the eighteenth century.

The earliest form of action for personal injuries was trespass *vi et armis* or *contra pacem*, that is, wrongful conduct involving force and arms or contrary to the king's peace. Another tort action, trespass, or action on the case, developed as an alternative to trespass *vi et armis* to give plaintiffs the opportunity to plead special circumstances, such as negligence, and to give a remedy when trespass did not permit one. Case examples will be discussed later in this Article.

Trespass *vi et armis* was based on the defendant's having done something he had no right to do, rather than his having done something negligently.[271] Consequently, if an archer shot a passerby or a careless horseman ran down a pedestrian, the injury and the defendant's act as the immediate cause of the injury were all that the plaintiff had to plead to recover. As a matter of law and legal pleading, negligence was irrelevant because no one had a right to injure others in these ways.[272] Consequently, strict liability appears to have been the standard of liability. Legal historians who maintain that strict liability was the tort standard of liability prior to the nineteenth century base their view in part on the pleading requirements of trespass *vi et armis*.[273]

Nonetheless, the pleading requirements of trespass *vi et armis* may not accurately reflect the proofs that were required to win a jury verdict. Almost a century ago, Charles Wigmore and, more recently, John Baker and S.F.C. Milsom, argued that as early as the sixteenth century, fault or negligence was a factual circumstance plaintiffs had to prove before juries would find defendants guilty.[274] These authors have suggested that the defendant's negligence may have become relevant if he pleaded the general issue "not guilty" and tried to excuse his action by explaining the circumstances to the jury. However, lacking records of trial proceedings and jury deliberations, conclusive evidence support-

271. J. Baker, *supra* note 13, at 340.

272. *Id.*; S. Milsom, *supra* note 9, at 296-98.

273. *See supra* notes 3-7 and accompanying text.

274. J. Baker, *supra* note 13, at 274, 341-42; S. Milsom, *supra* note 9, at 393-94; Wigmore, *supra* note 6, at 441, 443.

ing this view is nonexistent, and hence, the view itself will never advance beyond an unprovable hypothesis.[275]

Approaching the early cases of trespass *vi et armis* from the perspective of the principles and social policies of tort instead of attempting to determine whether the rule of decision was strict liability or fault, provides a clearer insight into pre-nineteenth-century jurists' understanding of tort. This approach will show that some of these early cases of trespass *vi et armis* can be interpreted as applying a fault standard of liability. It will also show that eighteenth- and early nineteenth-century treatise writers and judges interpreted these cases and understood trespass as based on a fault standard of liability.

Weaver v. Ward[276] is an example of how a case brought in trespass can be understood as applying a fault-based standard of liability. This 1616 decision is typically used by torts professors as precedent for the rule of strict liability in early tort actions of trespass *vi et armis*. The defendant in *Weaver* was one of a group of soldiers participating in military exercises with loaded muskets when he fired his musket and accidentally shot the plaintiff. The injured soldier brought an action of trespass *vi et armis* of assault and battery and won despite defendant's plea that they were soldiers and that the injury occurred accidentally and without his fault. Stating that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault," the court rejected the defendant's plea and found for the plaintiff.[277]

Although *Weaver* is generally understood as declaring the tort standard of strict liability, the court's analysis of the defendant's liability can be read as containing some of the elements of modern negligence law. The court suggested three circumstances in which a defendant was not liable. The first circumstance was when another person's act caused the harm: "as if a man by force take my hand and strike you."[278] The second circumstance was when the defendant's act caused the injury but the injured party himself was at fault in becoming injured, what courts by the eighteenth century defined as contributory negligence, which precluded recovery: "or if here the defendant had said . . . that the plaintiff ran across his piece when it was discharging."[279] If strict liability were the rule, the plaintiff's carelessness would have been irrelevant to the defendant's liability.[280]

The third circumstance was when the accident was inevitable. By "inevitable" the court seemed to mean that the injury was caused by unavoidable circumstances that were not brought about by the defendant's carelessness, for the court stated that the defendant was not liable if the injury "had been inevitable

275. J. BAKER, *supra* note 13, at 222; SELECT CASES, *supra* note 9, at xli-xliii.

276. Hob. 134, 80 Eng. Rep. 284 (K.B. 1616).

277. *Id.*

278. *Id.*

279. *Id.* A defense of contributory negligence is different from a defense of justification which was a recognized defense in trespass. In the latter defense, the defendant's act was immune from liability because it was permitted by law for some reason peculiar to the defendant. For example, a sheriff who wounded an escaping prisoner would be justified in inflicting the injury. Contributory negligence, on the other hand, goes to the issue of culpability. This defense would lie if the defendant's act directly caused the plaintiff's injury but the plaintiff's own carelessness contributed to his being injured.

280. For a contrary view, *see* SELECT CASES, *supra* note 9, at xli-xliii.

and that the defendant had committed no negligence to give occasion to the hurt."[281] This language suggests that the defendant would be liable if the defendant's carelessness had created a situation in which the plaintiff's injury became inevitable. Consider, for example, a defendant who was sailing his boat dangerously close to plaintiff's boat in a storm, and rough winds and water currents carried the defendant's boat into plaintiff's boat. Under these circumstances, the defendant would not succeed on a plea of inevitable circumstances because he was at fault in sailing his boat so close to the plaintiff's that the storm carried it into the plaintiff's boat.[282] Had he sailed at a safe distance and the storm nevertheless carried his boat into the plaintiff's boat, then his plea of inevitable necessity would be a good defense.

The court's opinion in *Weaver* can be read as expressing the tort principle that one was liable for injuries caused by actions that violated the community's standard of reasonable conduct in the circumstances. Thus, defendant's liability in *Weaver* can be understood as emanating from his having done something which, in Holmesian terms, a prudent person would not have done: he fired his musket in the presence of a crowd of people and shot the plaintiff. From this perspective, *Weaver* presents an example of an act that so clearly violated community standards of prudent conduct that one committed it at one's peril. From the perspective of John Baker, however, *Weaver* can be explained as a case in which the defendant was liable because he caused the injury by doing something that he had no right to do—firing his musket in a public place and striking the plaintiff—rendering it unnecessary to plead negligence or fault.[283] The fact that the act was unlawful served as the factual predicate of fault.

This analysis is suggested by eighteenth- and nineteenth-century treatise writers. They discussed *Weaver* more for the principles it expressed than for the technical rule of liability it set down for the action of trespass *vi et armis*. For example, Sir John Comyns included this case in his 1785 digest under the heading of "Action upon the Case for Negligence"[284] with other cases decided on the basis of a "Neglect in Taking Care." He cited *Weaver* for the principle that a soldier is liable for firing his musket and wounding another soldier unless the injury "was by inevitable necessity, and without his fault."[285] The fact that Comyns cited the language from an action brought in trespass *vi et armis* in his section on actions on the case for negligence suggests that he intended it to serve as a principle of tort and not as a technical rule of liability in trespass *vi et armis*.

Moreover, Comyns changed the language of the opinion in a way that demonstrates that he interpreted negligence to mean fault and trespass to require fault. The opinion in *Weaver* stated that the defendant was not liable if the injury "had been inevitable, and that the defendant had committed *no negli-*

281. *Id. Accord*, J. BAKER, *supra* note 13, at 342. *See also infra* notes 286-303.

282. See the discussion of late eighteenth- and early nineteenth-century cases that tried to distinguish trespass and case in suits involving negligence and direct injury, *infra* notes 332-404.

283. *See* Professor Baker's analysis of *Weaver* and Dickenson v. Watson, T. Jones 205, 84 Eng. Rep. 1218 (K.B. 1682) in J. BAKER, *supra* note 13, at 400-01.

284. *See supra* notes 23-27, and *infra* notes 320-21 and accompanying text.

285. 1 J. COMYNS, *supra* note 23, at 295.

gence to give occasion to the hurt."[286] Comyns changed "committed no negligence" to "without his fault."[287] The opinion in *Weaver* supported Comyns' interpretation because the court also stated that "no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, *prout ei bene licuit*) except it may be judged utterly without his fault."[288] Comyns read the two statements together and suggested that the defendant was not liable if he was without fault.

Nathan Dane also cited *Weaver* in his 1823 abridgement for what he declared was a "general principle [of tort], that if any hurt happen to one, by my act, I am liable in this action [on the case], unless it be *entirely without my fault* or *neglect* . . . ."[289] Thus, "if a soldier in exercising, hurt another, he is liable in this action [upon the case], unless he makes it appear it was *inevitable* and that he was in *no degree negligent* . . . ."[290] Dane clearly understood negligence to mean fault and interpreted *Weaver* as authority for a fault-based theory of tort.

Dane also cited an 1808 Virginia Supreme Court of Appeals decision in which Judge Tucker, relying on *Weaver*, declared that "to constitute a trespass, for which an action of trespass *vi et armis* is maintainable, the act causing the injury must be *voluntary*, and with some degree of *fault*; for if done *involuntarily*, and without fault, no action of trespass *vi et armis* lies."[291] As late as 1843, Chief Justice Nelson of the New York Supreme Court relied on *Weaver*[292] as well as *Gibbons v. Pepper*[293] as authority for the rule that an action of trespass would not lie unless the plaintiff could impute negligence or want of caution to the defendant's injuring act.[294]

Another treatise on which Dane relied in his discussion of the fault-based theory of tort is Sir Francis Buller's treatise on the law of nisi prius.[295] Buller described the trespass action for battery as requiring evidence of fault to render the defendant liable.[296] There, Buller also cited *Weaver* as authority for the principle that "no man shall be excused a trespass, unless it may be justified entirely without his default."[297] Buller gave additional examples of this fault principle from such well-known cases as *Underwood v. Hewson*[298] and *Gibbons v. Pepper*.[299] In his discussion of the latter case, Buller distinguished between an

286. Weaver v. Ward, Hob. 134, 134, 80 Eng. Rep. 284, 284 (K.B. 1616).

287. 1 J. COMYNS, *supra* note 23, at 208.

288. *Weaver*, Hob. at 134, 80 Eng. Rep. at 284.

289. 2 N. DANE, *supra* note 21, at 484.

290. *Id.*

291. Taylor v. Rainbow, 12 Va. (2 Hen. & M.) 423, 439-40 (1808).

292. Hob. 134, 80 Eng. Rep. 284 (K.B. 1616).

293. 4 Mod. 405, 87 Eng. Rep. 469, 1 Ld. Raym. 38, 91 Eng. Rep. 922, 2 Salk. 637, 91 Eng. Rep. 538 (K.B. 1695) (discussed *infra*, notes 298-304).

294. Harvey v. Dunlop, Hill & Den. 193, 194-95 (N.Y. Sup. Ct. 1843).

295. F. BULLER, *supra* note 14.

296. 2 N. DANE, *supra* note 21, at 484; F. BULLER, *supra* note 14, at 20-22.

297. F. BULLER, *supra* note 14, at 21.

298. *Id.* (discussing Underwood v. Hewson, 1 Str. 596, 93 Eng. Rep. 722 (K.B. 1723)). *See infra* text accompanying note 312.

299. *Id.* (discussing Gibbons v. Pepper, 4 Mod. 405, 87 Eng. Rep. 469, 1 Ld. Raym. 38, 91 Eng. Rep. 922, 2 Salk. 637, 91 Eng. Rep. 538 (K.B. 1695)).

injury caused by a horse that ran away with his rider, for which the rider was not liable, and such an injury caused when the plaintiff proved "that the horse had been used to run away with his rider," for which the rider was liable.[300] Buller concluded, "for in such case the rider is not free from blame."[301] Consequently, in addition to inficiation and justification, Buller listed "matter of excuse" as a defense to battery.[302] Buller defined this defense as "an admission of the fact; but saying it was done accidentally, and without any default in the defendant; and that (as I have already said) may be either pleaded or given in evidence on the general issue."[303] It is significant that this discussion in Buller's 1817 edition is identical to his discussion of the same subject found in his first edition published in 1768.[304]

These authorities demonstrate that trespass *vi et armis* was understood as fault based by the eighteenth century. They interpreted *Weaver* and other seventeenth- and early eighteenth-century trespass cases as authority for a fault principle of tort liability. Moreover, some of these authorities used *Weaver*, an action of trespass, as authority in explaining actions on the case for negligence or carelessness. This apparent anomaly makes sense if one understands that their purpose was to explain the principles and theories of tort law underlying these forms of actions rather than simply stating a technical rule of decision within rigid categories of writs. This evidence suggests that by the eighteenth century, tort principles underlying the writ of trespass were the same principles of culpability associated with actions on the case for personal injuries. These principles were so closely associated with case and trespass that judges in England and in the United States struggled in confusion for decades at the end of the eighteenth and beginning of the nineteenth centuries to distinguish these two forms of action.[305]

The moral principle of culpability which required individuals to conform to community standards of reasonable behavior and avoid unnecessary harm was more clearly reflected in actions on the case. Buller's 1817 discussion "Of Injuries Arising from Negligence or Folly" illustrates the point.[306] Buller writes that

> EVERY man ought to take reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained.[307]

In the supporting footnote of the 7th edition, Buller explains that

> There is a very wide distinction between a mere accidental and involuntary injury done to a man, and one that is the effect of negligence, folly, or culpable carelessness. . . .

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300. *Id.*
301. *Id.*
302. *Id.* at *17.
303. *Id.*
304. *Compare* F. BULLER, *supra* note 14, at 20-22 *with* F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS *16-17 (R. Bridgman 7th ed. 1817) [hereinafter F. BULLER, 7th ed.]
305. *See infra* notes 332-404 and accompanying text.
306. F. BULLER, *supra* note 14, at 35.
307. *Id.* (footnote omitted).

> This actions [sic] lie against the owner of a dog accustomed to bite, at the suit of the person bitten; but the declaration must show that the owner knew his dog was fierce . . . for the *scienter* is the gist of the action . . . .[308]
>
> Under this class of cases may also be ranked those of misfeasance in driving carriages. . . .[309]

This discussion of liability for "misfeasance in driving carriages" is taken in part from cases involving careless performance of undertakings in actions of assumpsit which evidences the equivalence in the meaning of the principles and rules of liability in the two forms of action:[310]

> So is the driver of a stage coach bound to inform the outside passengers where the way lies under a low and almost impassable gateway. . . . Proof that a stage coach broke down, and the plaintiff, a passenger, was much bruised, is sufficient to raise a presumption, that the accident arose either from the unskillfulness of the driver, or from the insufficiency of the coach, and it lies on the coach owner to negative these inferences.[311]

Among the cases Buller summarized in the text to illustrate this negligence principle are the 1723 case of *Underwood v. Hewson*,[312] "where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it;"[313] the 1676 decision in *Michael v. Alestree*,[314] "[i]f a man ride an unruly horse in any place much frequented, (such as *Lincoln's-Inn-Fields*) to break and tame him;"[315] and a 1698 case cited as *Anonymous*,[316] if "[t]he servants of a carman run over a boy in the streets, and maimed him, by negligence."[317] Buller also included cases in which "a *surgeon* undertake to cure

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308. F. BULLER, 7th ed., *supra* note 304, at *25 n.(a) (citing Mason v. Keeling, 12 Mod. 332, 88 Eng. Rep. 1359, 1 Ld. Raym. 606, 91 Eng. Rep. 1305 (K.B. 1700); Kinnion v. Davies, Cro. Car. 487, 79 Eng. Rep. 1021 (K.B. 1636); Smith v. Pelah, 2 Str. 1264, 93 Eng. Rep. 1171 (K.B. 1748); Buxendin v. Sharp, 2 Salk. 662, 91 Eng. Rep. 564, 3 Salk. 12, 91 Eng. Rep. 661, 1 Lutwyche 90, 125 Eng. Rep. 47 (K.B. 1696); Jones v. Perry, 2 Esp. 482, 170 Eng. Rep. 427 (K.B. 1797)). Thus, in these cases, the judges speak in terms of a duty (*Jones*, 2 Esp. at 483, 170 Eng. Rep. at 428) to take "all reasonable caution" (*Mason*, 1 Ld. Raym. at 608, 91 Eng. Rep. at 1307), to prevent animals from injuring passersby, but that the owner must have notice of an otherwise tame animal's "ill quality" to hold him liable (*Mason*, 12 Mod. at 36, 88 Eng. Rep. at 1361). Without notice, the animal owner could not have breached the standard of care expected of animal owners for which he was liable. Moreover, this rule was based on the policy interest of preventing the safety of the king's subjects from being endangered. *Smith*, 2 Str. at 1264, 93 Eng. Rep. at 1171. This rule is still in force today and is known as the "one bite" rule.

309. F. BULLER, 7th ed., *supra* note 304, at *25 n.(a) (citing Aston v. Heaven, 2 Esp. 533, 170 Eng. Rep. 445 (C.P. 1797); Wordsworth v. Willan, 5 Esp. 273, 170 Eng. Rep. 809 (C.P. 1805). Chief Justice Eyre declared, "This action is founded entirely in negligence . . . . This action stands on the ground of negligence alone." *Aston*, 2 Esp. at 534-35, 170 Eng. Rep. at 446. The case stands for the rule that "coach-owners are not liable for injuries to passengers, from accident or misfortune, where there has been no negligence or default in the driver." *Id.* at 533, 170 Eng. Rep. at 445. *See supra* notes 199-204 and accompanying text.

310. *See supra* notes 19-31 and accompanying text.

311. F. BULLER, 7th ed., *supra* note 304, at 425 n.(a) (citing Dudley v. Smith, 1 Camp. 167, 170 Eng. Rep. 915 (K.B. 1808) (discussed *supra* at note 213; Christie v. Griggs, 2 Camp. 79, 170 Eng. Rep. 193 (C.P. 1809) (discussed *supra* at notes 205, 229-30)).

312. 1 Str. 596, 93 Eng. Rep. 722 (K.B. 1723).

313. F. BULLER, 7th ed., *supra* note 304, at *25.

314. 2 Lev. 172, 83 Eng. Rep. 504, 1 Vent. 295, 86 Eng. Rep. 190, 3 Keb. 650, 84 Eng. Rep. 932 (K.B. 1676). *See infra* notes 325-31.

315. F. BULLER, 7th ed., *supra* note 304, at *25.

316. 1 Ld. Raym. 739, 91 Eng. Rep. 1394 (K.B. 1698).

317. F. BULLER, 7th ed., *supra* note 304, at *25.

a person, and by his negligence and unskillfulness miscarry."[318] In a footnote, Buller cautioned that "want of skill alone will not maintain this action, for there must also be evidence of negligence and carelessness to the evident detriment of the patient."[319]

Again, this discussion published in 1817 is identical doctrinally to Buller's first edition published in 1768.[320] The only difference between the two is that the editor of the 1817 edition added cases decided after 1768. Buller's use of actions of trespass, assumpsit, and case interchangeably suggests that the principles underlying the rules in these distinct forms of action were the same or equivalent in his mind. The same can be said for Sir John Comyns and Nathan Dane.[321] This also shows that, by the eighteenth century, the concept of negligence was understood as fault and was the same concept whether it was applied in actions of trespass, case or assumpsit.

That fault or negligence was more clearly an element in actions on the case than in trespass *vi et armis* is understandable when one considers the pleadings under these writs. Recall that in an action of trespass, the plaintiff merely pleaded the injury and the defendant's act as the direct cause. Case developed as a substitute for trespass *vi et armis* to give plaintiffs the opportunity to plead special circumstances, such as negligence, and to provide a remedy when trespass *vi et armis* and other forms of actions did not permit one. For example, if a person were physically injured by someone's servant, the injured party might bring trespass *vi et armis* against the servant, but if he wanted to sue the master, he could not bring this action because the master's act was not the immediate cause of the injury. Instead, the plaintiff brought an action on the case and pleaded the servant's negligence as the cause of his injury for which the master was liable under the doctrine of respondeat superior. That the master was liable for his servant's negligence was considered a well-settled rule in 1698.[322] Early actions on the case for negligence also were brought against persons who had undertaken to do something but performed carelessly to the plaintiff's injury.[323] Plaintiffs had to plead and prove the defendants' negligence to establish liability. The use of actions on the case to sue for forcible injuries that resulted directly from the defendant's act but were unconnected to undertakings became more common in the late eighteenth century. Legal historians attribute this development to growth in transportation which gave rise to

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318. *Id.* at *26 (footnote omitted).

319. *Id.* at *25 n.(d) (citing Searle v. Prentice, 8 East 348, 103 Eng. Rep. 376 (K.B. 1807); Slater v. Baker, 2 Wils. K.B. 359, 95 Eng. Rep. 860 (C.P. 1767)). A surgeon's liability in tort for negligence was laid down in Dr. Groenvelt's Case, 1 Ld. Raym. 213, 214, 91 Eng. Rep. 1038, 1039 (K.B. 1697). *See* 3 BLACKSTONE, *supra* note 21, at *122.

320. *Compare* F. BULLER, *supra* note 14, at 35-37 *with* F. BULLER, 7th ed., *supra* note 304, at *25-26.

321. *See supra* notes 284-90 and accompanying text.

322. Anonymous, 1 Ld. Raym. 739, 91 Eng. Rep. 1394 (K.B. 1698); *appears to be the case cited with approval in* Jones v. Hart, 2 Salk. 441, 91 Eng. Rep. 382, Holt, K.B. 642, 90 Eng. Rep. 1255 (1698).

323. *See supra* notes 16-30 and accompanying text.

greater numbers of pedestrians being run over by carriages and stagecoaches and to more frequent collisions between carriages and between ships.[324]

Mitchil v. Alestree,[325] decided in 1676, was a seminal "running down" case and is credited with making a major stride toward the modern English action of negligence.[326] In that case, the plaintiff sued a master and his servant for injuries he sustained when the horse the servant was riding ran him down. Plaintiff brought an action of trespass *vi et armis* alleging that the servant had negligently permitted the horse to injure him. Chief Justice Hale dismissed this action because the plaintiff had failed to prove that it was the servant's negligent handling of the horse that had caused the horse to run him down.[327] Absent this proof, the court noted, one might infer that the collision was caused by the independent act of the wild horse which the rider was unable to control despite his best efforts. In these circumstances, trespass would fail because the collision would be attributable to the horse's independent act, not to the rider's careless handling of the horse.[328]

Chief Justice Hale suggested an action on the case as an alternative theory that the plaintiff might argue if he brought a second suit. Because the master had sent the servant to Lincoln's Inn Fields, a public park, to break the horse he was riding, Chief Justice Hale suggested that the defendants' wrong was breaking the wild horse in a public place. Consequently, the plaintiff sued again, this time in case, and alleged that the defendants were negligent in bringing "horses wild to tame, in Little Lincoln-fields, being an open publick place where people are all the day passing and repassing."[329] After a jury verdict for the plaintiff, defendants moved in arrest of judgment on the grounds that plaintiff did not allege or offer evidence to show that the driver was negligent in handling the horses or that the defendants knew that the horses were unruly.[330] The court brushed past these arguments and affirmed the judgment declaring that "[i]t was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people."[331] The defendants were liable for the injury because it was the consequence of a decision made without due consideration of individuals' safety. In other words, the defendants should have foreseen that breaking a wild horse in a public park would likely injure someone and thus could have avoided the injury had they been more prudent. It was this incautiousness or negligence that rendered the defendants legally liable for the injury.

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324. M. HORWITZ, *supra* note 3, at 95; W. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, 246, n.17 (1975); M. PRICHARD, *supra* note 12, at 15.

325. 1 Vent. 295, 86 Eng. Rep. 190 (K.B. 1676) (case also reported as Michell v. Allestry, 3 Keb. 650, 84 Eng. Rep. 932 (K.B. 1676); Michael v. Alestree, 2 Lev. 172, 83 Eng. Rep. 504 (K.B. 1676)).

326. J. BAKER, *supra* note 13, at 344; S. MILSOM, *supra* note 9, at 311-12.

327. J. BAKER, *supra* note 13, at 344.

328. *Accord*, Gibbons v. Pepper, 4 Mod. 404, 87 Eng. Rep. 469, 1 Ld. Raym. 38, 91 Eng. Rep. 922, 2 Salk. 637, 91 Eng. Rep. 538 (K.B. 1695).

329. Michell v. Allestry, 3 Keb. 650, 650, 84 Eng. Rep. 932, 932 (K.B. 1676).

330. Michael v. Alestree, 2 Lev. 172, 172, 83 Eng. Rep. 504, 504 (K.B. 1676).

331. Mitchil v. Alestree, 1 Vent. 295, 295, 86 Eng. Rep. 190, 190 (K.B. 1676).

The significance of *Mitchil v. Alestree* is that it afforded victims of forcible injuries an alternative action to trespass *vi et armis* when they preferred to sue on the actor's negligence rather than on the immediate forcible act which caused the injury. Case was preferable for at least two reasons. Had the plaintiff brought trespass, he could not have sued the master because the master did not commit the action that directly caused the immediate harm.[332] Secondly, the plaintiff could not win in a trespass action because he could not show that the driver was at fault or negligent in handling the horses.[333] By suing in case and alleging negligence in creating a dangerous circumstance in which injury was likely to occur, plaintiff was able to reach both the driver and his master. Moreover, case generally was preferable to trespass because successful plaintiffs could recover costs in the former but not in the latter.[334]

After *Mitchil v. Alestree*, victims of accidents could sue either in trespass or in case. With trespass and case available for the same injury, courts struggled to determine when one or the other was the appropriate form of action for forcible injuries to persons or property due to the defendant's negligence. The confusion that emerged in the eighteenth century resulted from pleadings that were the same in both actions: injury caused by the immediate act of the defendant and carelessness. The analysis that follows will show that the principle of law distinguishing these actions was generally accepted, but difficult to apply.

Depending on the specific facts of a case, English courts decided whether trespass or case was the appropriate action on four criteria: Whether the act was wilful, whether it was lawful, whether the act was committed by the defendant or his servant, and whether the injury was immediate or consequential. Injuries caused by intentional or unlawful acts were always sufficient grounds for tort liability. However, courts in the eighteenth century rejected these two criteria as generally applicable principles distinguishing trespass from case because intent to injure and unlawful acts were not always involved in the suits.[335]

The primary principle used to differentiate trespass and case was recognized and established early in the common law. This distinction was whether the injury was the immediate and direct result of the defendant's act, or whether it was consequential.[336] This distinction and its relationship to the other criteria was elaborately explained in the case of *Scott v. Shepherd*,[337] decided in 1773. This was the famous case in which the defendant threw a lighted squib

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332. *See infra* notes 355-59 and accompanying text.

333. *See, e.g.*, Gibbons v. Pepper, 4 Mod. 404, 87 Eng. Rep. 469, 1 Ld. Raym. 38, 91 Eng. Rep. 922, 2 Salk. 637, 91 Eng. Rep. 538 (K.B. 1695) (battery does not lie against a horse rider if the horse took fright and ran away, injuring a pedestrian).

334. A. KIRALFY, *supra* note 13, at 108.

335. Scott v. Shepherd, 2 Black. W. 892, 894-95, 96 Eng. Rep. 525, 526-27, 3 Wils. 403, 410-11, 95 Eng. Rep. 1124, 1128-29 (K.B. 1773); Leame v. Bray, 3 East 593, 599-602, 102 Eng. Rep. 724, 726-27 (K.B. 1803).

336. Reynolds v. Clarke, 2 Ld. Raym. 1399, 92 Eng. Rep. 410, 1 Str. 634, 93 Eng. Rep. 747 (K.B. 1725). The report in Strange, however, can be read as putting the distinction on the lawfulness or unlawfulness of the act. In contrast, the report in Lord Raymond makes the immediate/consequential injury distinction, which was characterized in the eighteenth century as a long-established and settled doctrine. *See* Pitts v. Gaince, 1 Salk. 10, 11, 91 Eng. Rep. 10, 11, n.(a) (K.B. 1696); Morgan v. Hughes, 2 T.R. 225, 231, 100 Eng. Rep. 123, 126 (K.B. 1788); F. BULLER, 7th ed., *supra* note 304, at *26; 1 J. COMYNS, *supra* note 23, at *128; 3 W. BLACKSTONE, *supra* note 21, at *122.

337. 3 Wils. 403, 95 Eng. Rep. 1124, 2 Black. W. 892, 96 Eng. Rep. 528 (K.B. 1773).

into a market area. It landed on a bakery stand, and, to protect himself, the baker Willis threw it across the way where it landed on another baker's stand. When the second baker, Ryall, threw it away in self-defense, it hit the plaintiff in the face, exploded, and put out his eye.

Plaintiff brought an action of trespass for assault and won a jury verdict of £100 subject to the opinion of the court whether trespass or case was the proper action. It decided that the plaintiff was correct in bringing his action in trespass. The judges, including the eminent Sir William Blackstone, seemed to rest their decisions on different theories of law, but they did not. They agreed that trespass was the proper action for immediate harm and case for consequential injury. Their disagreement in fact stemmed from their differing applications of this doctrine. The judges disagreed as to

> whether the injury to Scott was to be considered as arising directly and immediately from the wrongful act of Shepherd, as if the squib had been thrown at him in the first instance . . . without the agency of Willis and Ryall; or whether they were to be considered as having severally given it a new and original impulse.[338]

Whether Scott's injury was the immediate or consequential result at law of Shepherd's toss depended on whether Willis' and Ryall's tosses were attributable at law to Shepherd or whether they were independent acts. The judges' answers to this question turned on whether Willis' and Ryall's reactions were excused under law.

Three judges, characterizing the three tosses of the squib as one continuous act put into motion by the defendant, concluded that the injury was the immediate result of the defendant's act and that trespass was the proper action. However, they found Shepherd to be the immediate actor under three distinguishable, albeit similar, rationales. Judge Nares reasoned that one who commits an unlawful act "is liable to answer for the consequences, be the injury mediate or immediate."[339] Judge Gould's theory was that Shepherd was the only wrongdoer because "his act put Willis and Ryall under an inevitable necessity of acting as they did."[340] Consequently, "[t]he defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face."[341] Judge De Grey closely paralleled Judge Gould's analysis and reasoned that Shepherd was liable because Willis' and Ryall's actions were "a continuation of the first act of the defendant until the explosion of the squib."[342] He asserted that "no man contracts guilt in defending himself; the second and third men were not guilty of any trespass, but all the injury was done by the first act of the defendant . . . all the facts or throwing the squib must be considered as one single act, namely the act of the defendant."[343] Regardless of the theory, the result these judges reached with respect to the two bakers reasonably fits within the third defense to a trespass identified by the court in *Weaver*: if the

338. *Scott*, 2 Black. W. at 900, 96 Eng. Rep. at 529.
339. *Id.*
340. *Scott*, 3 Wils. at 411, 95 Eng. Rep. at 1128.
341. *Scott*, 2 Black. W. at 898, 96 Eng. Rep. at 525.
342. *Scott*, 3 Wils. at 412-13, 95 Eng. Rep. at 1129.
343. *Id.*

injury "had been inevitable . . . the defendant had committed no negligence to give occasion to the hurt."[344]

It is precisely on the issue of Willis' and Ryall's culpability that Blackstone disagreed with his three judicial brothers. Blackstone characterized Willis' and Ryall's tosses of the squib as independent, unreasonable acts. Blackstone reasoned that they "have exceeded the bounds of self-defense, and not used sufficient circumspection in removing the danger from themselves."[345] Consequently, Ryall, the second baker who tossed the squib at the plaintiff's face, was "the immediate actor in this unhappy business," and he alone was liable in trespass not only because Scott's injury resulted immediately from his action, but also because, having acted unreasonably, he was at fault in causing it.[346]

Blackstone's disagreement with his judicial brothers was not due to different theories of trespass and case, but to the reasonableness of the intervening actors in removing themselves from the dangerous situation created by Shepherd. Gould and De Grey excused the bakers on theories of inevitable necessity and self-defense. Nares characterized their actions as a chain reaction to Shepherd's initial unlawful act in which they were subsumed. Although Blackstone believed that Willis' and Ryall's unreasonable reactions precluded a factual finding and legal conclusion that Shepherd's act was the immediate and direct cause of plaintiff's injury rendering him liable in trespass, he nevertheless concluded that Shepherd's act was the indirect cause of the injury. Therefore, Blackstone was of the opinion that "where [the injury] is only consequential, it must be an action on the case."[347]

By the time of *Scott v. Shepherd*, plaintiffs in actions of trespass and in actions on the case routinely charged defendants with negligence, carelessness, unskillfulness or similar culpable behavior in causing the injuries for which they were suing.[348] Suits that involved immediate, forcible harm caused by the defendants' negligence complicated the distinction between case and trespass. This created a problem. If trespass was the proper action for injuries resulting immediately from forcible acts, and if case was the proper action for injuries resulting from negligent acts, which action should be brought when both direct injury and negligence were pleaded? Blackstone observed in *Scott v. Shepherd* that the same evidence that supported a trespass action also could maintain an action on the case, but not the reverse.[349] The reason is that the gravamen of trespass was direct, forcible harm flowing immediately from the negligent action of the defendant being sued, whereas the gravamen of case was injury resulting directly or indirectly from the negligent acts of the defendant or others.

The distinction between trespass and case was well explored by Lord Kenyon in two running-down cases that led to seemingly inconsistent results. The

344. Weaver v. Ward, Hob. 134, 80 Eng. Rep. 284 (K.B. 1616).

345. *Scott*, 2 Black. W. at 896, 96 Eng. Rep. at 527.

346. *Id.*

347. *Id.* at 894, 96 Eng. Rep. at 526 (citations omitted).

348. In addition to the cases cited in the footnotes immediately following, *see, e.g.*, Tenant v. Goldwin, 6 Mod. 311, 87 Eng. Rep. 1051 (Q.B. 1704); Bibbins v. Mantel, 2 Wils. K.B. 358, 95 Eng. Rep. 860 (1767).

349. *Scott*, 2 Black. W. at 897, 96 Eng. Rep. at 528.

first case, *Day v. Edwards*,[350] was an action on the case between two private parties decided in 1794. The plaintiff complained that the defendant "furiously, negligently and improperly drove the . . . cart and horse . . . [so that it] . . . struck with great force and violence upon and against the said carriage of the plaintiff, and thereby . . . damaged the same."[351] The second case, *Ogle v. Barnes*,[352] decided five years later by the same court, was also an action on the case involving a ship collision in which the plaintiff charged that the defendants "so incautiously, carelessly, negligently, and inexpertly managed, steered, and directed their ship . . . that [it] . . . sailed . . . against the said ship of the plaintiff with great force, so that the plaintiff's ship was greatly damaged . . . ."[353] In both cases, the defendants argued that the plaintiffs brought the wrong action, that the correct action was trespass *vi et armis*. In the first case, the court agreed and found judgment for the defendant. In the second, it disagreed and decided for the plaintiff. Lord Kenyon wrote opinions in both cases.

Despite appearances, these cases were not inconsistent. Lord Kenyon applied the same principle in both cases to distinguish case and trespass. In the first case, *Day v. Edwards*, Lord Kenyon concluded that "the plaintiff complains of the immediate act, and therefore he should have brought trespass."[354] Whereas, in the second case, *Ogle v. Barnes*, the ship was under the care of only one of the named defendants and some of the crewmen. The injury could not have been caused by the immediate acts of all of the defendants. Therefore, Lord Kenyon concluded that the plaintiff based his action on the defendants' negligence: "The charge imputed to these defendants is, that they so carelessly and negligently steered their vessel, that by reason of such negligence, their vessel sailed against and ran foul of the plaintiff's; *and for that negligence they are liable in an action upon the case.*"[355] It appears that Lord Kenyon imputed the charge in the second case from the facts more than from the pleadings because these pleadings were virtually indistinguishable from those of the first case. Nevertheless, the principle that distinguished trespass and case is as follows: If the plaintiff brought his action on the defendant's immediate act, albeit an act of negligence, his action was trespass. However, if the plaintiff based his action on the defendant's negligence, his action was case even though his injury was the direct result of defendant's act of force.

Hindsight and subsequent cases give certainty to this conclusion, even though these two 1790s decisions did not completely settle the question whether trespass or case was the proper action to bring for injuries caused by the named defendant's immediate and negligent act. Although the immediate/consequential distinction was clear and accepted, its application continued to produce conflicting and inconsistent results. This procedural issue even unsettled the doc-

350. 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794).
351. *Id.*
352. 8 T.R. 188, 101 Eng. Rep. 1338 (K.B. 1799).
353. *Id.*
354. *Day*, 5 T.R. at 649, 101 Eng. Rep. at 362.
355. *Ogle*, 8 T.R. at 191, 101 Eng. Rep. at 1340 (emphasis added).

trine that held a master liable in case for the torts of his servants.[356] The question arose whether a master was liable in trespass or case for the willful acts, or trespasses, of his servants.[357] The issue was decided in 1800 by *McManus v. Crickett*,[358] which concluded that the plaintiff should sue the master in case, grounding his action on the negligence, carelessness, or other circumstances surrounding the servant's act which denoted consequential harm.[359]

The inconsistent application of the immediate/consequential distinction became institutional in a series of cases decided in the first four decades of the nineteenth century. King's Bench and Common Pleas disagreed whether trespass or case should be brought for immediate injury arising from defendant's negligence.[360] Although King's Bench and Common Pleas could not agree on the proper action to bring for an immediate and negligent act, Joseph Chitty's 1809 treatise on pleadings[361] stated the rule as if there were no controversy on the subject. Chitty distinguished between trespass and case according to the immediate force/consequential injury distinction.[362] Acknowledging frequent difficulty involved in determining whether an injury is immediate or consequential, he nevertheless asserted that an injury is immediate "when the act complained of *itself* . . . occasions the injury."[363] Chitty also stated: "[I]f the injury were attributable to negligence, though it were immediate, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and to declare in case; or to consider the act itself as the injury, and to declare in trespass."[364] Thus, a plaintiff could bring trespass against a defendant who shot him when he incautiously fired a gun in a public place;[365] or he could bring case for negligence. Chitty concluded that case was the proper remedy for injuries to persons arising from negligence or carelessness.[366]

The position stated by Chitty was consistent with that affirmed in Common Pleas at the end of the eighteenth century. In 1823, the Court of Exchequer adopted this rule and permitted a plaintiff to sue in case for forcible, direct

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356. The rule holding a master liable for the negligence of his servants acting within the scope of employment was settled in the seventeenth century. *See, e.g.*, Middleton v. Fowler, 1 Salk. 282, 91 Eng. Rep. 247 (K.B. 1698).

357. Anonymous, 1 Ld. Raym. 739, 91 Eng. Rep. 1394 (K.B. 1698) (This case was interpreted by Lord Kenyon as suggesting that a master is liable only for servant's negligence and not for his willful acts. McManus v. Crickett, 1 East 106, 108, 102 Eng. Rep. 43, 44 (K.B. 1800)). *Anonymous appears to be the case cited with approval in* Jones v. Hart, 2 Salk. 441, 91 Eng. Rep. 382, Holt K.B. 642, 90 Eng. Rep. 1255 (1698).

358. 1 East 106, 102 Eng. Rep. 43 (K.B. 1800).

359. McManus v. Crickett, 1 East 106, 108, 102 Eng. Rep. 43, 44 (K.B. 1800); *See also* Savignac v. Roome, 6 T.R. 125, 101 Eng. Rep. 470 (K.B. 1794); Morley v. Gaisford, 2 H. Bl. 441, 126 Eng. Rep. 639 (K.B. 1795); Brucker v. Fromont, 6 T.R. 659, 101 Eng. Rep. 758 (K.B. 1796); Turner v. Hawkins, 1 Bos. & Pul. 472, 126 Eng. Rep. 1016 (K.B. 1796).

360. *Compare* Leame v. Bray, 3 East 593, 102 Eng. Rep. 724 (K.B. 1803), *and* Cavell v. Laming, 1 Camp. 497, 170 Eng. Rep. 1034 (K.B. 1808) *with* Rogers v. Imbleton, 2 Bos. & Pul. (N.R.) 117, 127 Eng. Rep. 568 (C.P. 1806), Huggett v. Montgomery, 2 Bos. & Pul. (N.R.) 446, 127 Eng. Rep. 702 (C.P. 1807), *and* Bowcher v. Noidstrom, 1 Taunt. 568, 127 Eng. Rep. 954 (C.P. 1809).

361. 1 J. CHITTY, A PRACTICAL TREATISE ON PLEADING: AND ON THE PARTIES TO ACTIONS, AND THE FORMS OF ACTIONS.

362. *Id.* at *122.

363. *Id.* at *125.

364. *Id.* at *127.

365. *Id.* at *126 n.(1) (citing Taylor v. Rainbow, 12 Va. (2 Hen. & M.) 423 (1808)).

366. *Id.* at *136, *138-39.

injury caused by defendant's negligence and carelessness.[367] King's Bench adopted the same rule in 1825.[368] The judges agreed that when the gravamen of the suit was negligence, action on the case may be brought. Interestingly, in that decision, Judge Bayley observed that, early in his professional career, case was the usual form of action for such injuries, but that doubts arose in Lord Kenyon's time around the turn of the nineteenth century.[369] Bayley sought to resolve these doubts by interpreting *Leame v. Bray*,[370] the 1803 King's Bench decision that appeared to hold that only trespass could be brought for an injury caused by an immediate and negligent act, as instead holding merely that trespass was maintainable in such cases, not that an action on the case would have been improper.[371] The court reaffirmed the principle stated by Blackstone in *Scott v. Shepherd*, which it traced back to the 1699 case of *Pitts v. Gaince*, that when immediate and consequential injuries occurred in the same action, plaintiffs had the option of waiving the trespass and suing in case.[372] Finally, in the case identified as establishing the modern English tort of negligence,[373] Common Pleas authoritatively affirmed its position and held "that where the injury is occasioned by the carelessness and negligence of the Defendant, although it be occasioned by his immediate act, the Plaintiff may, if he thinks proper, make the negligence of the Defendant the ground of his action, and declare in case."[374] Chief Justice Tindall added one qualification: "so long as it is not a wilful act."[375]

American courts at the turn of the nineteenth century also showed conflict over the proper forms of action. This is understandable since American judges relied heavily on English decisions. The New Jersey Supreme Court, for example, cited the 1794 King's Bench decision in *Day v. Edwards*[376] in 1795 and held that trespass and not case was the proper action to recover damages for injuries to the plaintiff's horse when it was run over by a horse and sleigh which the defendant drove negligently.[377] Nevertheless, the New York Supreme Court in 1804 reflected the position of Common Pleas when it permitted a plaintiff to sue in case "for so negligently and unskillfully managing his vessel" that it collided with the plaintiff's vessel and injured some of the crew.[378]

In 1800, moreover, the Pennsylvania Supreme Court held a ship owner liable in an action on the case for injuries to the plaintiff's brig when it collided

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367. Lloyd v. Needham, 11 Price 608, 147 Eng. Rep. 579 (Ex. 1823).

368. Moreton v. Hadern, 4 B. & C. 223, 107 Eng. Rep. 1042 (K.B. 1825).

369. *Id.* at 226, 107 Eng. Rep. at 1043.

370. 3 East 593, 102 Eng. Rep. 724 (K.B. 1803).

371. This reading of *Leame v. Bray* was adopted by Chief Justice Tindall. Williams v. Holland, 10 Bing. 112, 116, 131 Eng. Rep. 848, 849 (C.P. 1833). However, Bayley's view seems untenable in light of the court's opinions in *Leame* and Lotan v. Cross, 2 Camp. 464, 170 Eng. Rep. 1219 (K.B. 1810).

372. Scott v. Shepherd, 2 Black. W. 892, 897, 96 Eng. Rep. 525, 528 (K.B. 1773); Pitts v. Gaince, 1 Salk. 10, 91 Eng. Rep. 10 (K.B. 1700).

373. S. MILSOM, *supra* note 9, at 398.

374. Williams v. Holland, 10 Bing. 112, 117, 131 Eng. Rep. 850 (C.P. 1833).

375. *Id.* at 117-18, 131 Eng. Rep. at 850.

376. 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794).

377. Waldron v. Hopper, 1 N.J.L. 390 (N.J. Sup. Ct. 1795). The horses "ran off" because defendant was drunk and had fallen asleep.

378. Van Cott v. Negus, 2 Cai. R. 235 (N.Y. Sup. Ct. 1804).

with defendant's ship.[379] The first question for the jury was whether the collision was caused by "negligence, and improvident and unskillful management" of defendant's ship by a public pilot.[380] The jury found it was, and the court awarded the plaintiff the full amount of his loss, declaring that "it is a rational, and a legal principle, that the compensation should be equivalent to the injury."[381] This decision reflected the English rule holding an owner liable for the negligent acts of those in his service. Additionally, the Massachusetts Supreme Court in 1804 nonsuited the owners of a water carrier who sued in trespass for the loss of their expected profits when their ship was forced back to port because the defendant shot and wounded the ship's master.[382] Although the opinion merely declared that the action should have been case and not trespass, the head note states the rule of decision: "*Trespass* will not lie for consequential [in]jury."[383]

However, a Massachusetts case decided ten years later demonstrated the difficulty courts sometimes experienced in applying this rule.[384] Although he acknowledged the "well-known distinction of immediate injury and consequential injury" as the rule of decision, Chief Justice Sewall noted that applying it was "a question of some difficulty in the circumstances of this case."[385] The suit presented the question whether trespass or case was the proper action for the loss of a chaise that was destroyed when the horse pulling it panicked and ran away because the defendant fired his guns across the road. The plaintiff sued in trespass, and the parties agreed to the statement of facts.

The factor that decided the issue was not a procedural rule but tort principles applied to the facts. The court's analysis focused on the critical question whether the horse was close enough to the defendant that he could have seen the horse, "and the distance was such as that, by common experience, there might be a reasonable apprehension of frightening the horse by the discharge of the guns."[386] The court decided that the horse was close enough to the defendant for him to have foreseen the danger. It held him liable in trespass "although no purpose of mischief was proved, and even if it was not a case of very gross negligence."[387] The court decided that the defendant's act was sufficiently immediate to constitute trespass by implicitly employing tort principles of notice, foreseeability, and breach of a duty of care to the public. Nevertheless, even granting the court's analysis in establishing the defendant's liability, it is diffi-

379. Bussy v. Donaldson, 4 Dall. 206 (Pa. 1800).

380. *Id.* at 207. A second question of law presented was whether the ship owner was liable for the pilot's negligence because a state statute mandated the use of a pilot without affording a choice of pilots. The court held that the owner was liable notwithstanding the statute. A third question was the measure of damages.

381. *Id.*

382. Adams v. Hemmenway, 1 Mass. 145 (1804). Nonetheless, plaintiffs were permitted to include consequential damages in trespass actions in other states. *See* Johnson v. Courts, 3 H. & McH. 510 (Md. 1796); Gates v. Miles, 3 Conn. 64, 73 (1819).

383. *Adams*, 1 Mass. at 145.

384. Cole v. Fisher, 11 Mass. 137 (1814).

385. *Id.* at 138.

386. *Id.*

387. *Id.*

cult to understand why the injury was immediate and not simply a consequence of the defendant's act.

The Virginia Supreme Court of Appeals decided a more difficult case in the same way in 1808.[388] In that case, the plaintiff sued for the loss of his leg when the defendant discharged a gun in a public place and shot the plaintiff "through *neglect*, and for want of due *caution*, but without any *design to injure*."[389] The plaintiff's claim included consequential damages for medical costs and loss of business during his infirmity. The plaintiff sued in an action on the case, and the question was whether he should have sued in trespass. For trespass *vi et armis* to lie, the court declared, "the act causing the injury must be *voluntary*, and with some degree of *fault*."[390] Reminiscent of the Lincoln's Inn Fields case,[391] the defendant was at fault when he carelessly fired his gun in a public place where someone was likely to be injured. Nonetheless, the court reversed a lower court judgment for the plaintiff and held that he should have sued in trespass.

Two concurring opinions restated the principle more precisely in terms of the immediate/consequential distinction. Judge Roane, in his concurrence, stated that "[t]here is no position in the law more clearly established than this; that, 'wherever the injury is committed by the *immediate act* complained of, the action *must be* trespass.' "[392] Similarly, Judge Fleming concurred by noting that "a line of distinction" between trespass and case was settled in *Reynolds v. Clarke*:[393]

> [T]hat, where the *immediate act itself* occasions a prejudice, or is an injury . . . the proper remedy is by action of trespass *vi et armis*; but, where the *act itself* is not an injury, but a *consequence* from that act is prejudicial to the plaintiff's person, &c. his remedy is by an action on the case.[394]

Thus, the Virginia Supreme Court of Appeals held that trespass was the proper action even for consequential damages because plaintiff's injury immediately resulted from defendant's careless firing of his gun.

This Virginia decision and Chief Justice Sewall's 1814 opinion appear to reach results contradictory to those reached in 1804 by the New York and Massachusetts supreme courts. However, it is important to note that the rule of decision as to whether trespass or case was the proper action was the same in all of these cases. Consequently, these cases are consistent with respect to the governing rule of law. The inconsistent results are explained by the respective courts applying the law to the facts differently. Again, it is significant to an understanding of the tort theory underlying trespass and case that the same declarations of negligence and immediate harm supported both actions. Fault or

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388. Taylor v. Rainbow, 12 Va. (2 Hen. & M.) 423 (1808).

389. *Id.* at 437.

390. *Id.* at 440.

391. *See supra* notes 325-31 and accompanying text.

392. *Id.* at 442 (quoting Day v. Edwards, 5 T.R. 648, 649, 101 Eng. Rep. 361, 362 (K.B. 1794)).

393. 2 Ld. Raym. 1399, 92 Eng. Rep. 410 (K.B. 1725)).

394. *Taylor*, at 12 Va. at 445 (citing with approval Reynolds v. Clarke, 2 Ld. Raym. 1399, 1402, 92 Eng. Rep. 410, 413 (K.B. 1725). *See also* Byrd v. Cocke, 1 Va. (1 Wash.) 232 (1793) (action on the case is correct action for consequential injury).

culpability was an element in both actions. Nevertheless, this judicial inconsistency must have been disconcerting to lawyers since it undermined certainty in the law and rendered predictability of future judicial decisions problematical.

The New York Supreme Court in the 1817 case of *Blin v. Campbell*[395] identified an effective solution to the problem. It was not until this year that the issue whether trespass or case was the proper action for immediate injury involving negligence was presented for decision in New York.[396] The court cited Chitty[397] as authority and held

> that if the injury was attributable to negligence, though it were immediate, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass.[398]

The court concluded that the plaintiff correctly brought an action on the case against a trooper for negligently firing his pistol and wounding the plaintiff in the leg.

Notwithstanding this 1817 decision, the New York court seemed to confuse the issue in an 1820 trespass action involving a collision between two ships.[399] The jury decided in favor of the plaintiff in a special verdict in which they found "that the disaster was the result of gross negligence in the defendant."[400] The question presented to the court on appeal was whether, if the collision which produced "the injury immediately and directly, be the result of negligence, and not of a willful intention, the act ought to be trespass or case."[401] The court affirmed the election of actions rule that it embraced three years earlier in *Blin v. Campbell*, but it seemed to confuse the issue when it declared "that if the defendant is liable at all, this action is appropriate, and that it ought to have been trespass rather than case, as the injury was immediate, and from gross negligence."[402] The court interpreted this language six years later to mean that trespass was the proper action because plaintiff sued on the defendant's act as the cause of injury. By 1826 the election of actions rule seemed to have resolved the question whether to bring an action in trespass or in case in New York. Plaintiff determined the proper form of action by electing to sue on the defendant's act itself or on the defendant's negligence as the cause of the injury.[403] This distinction between trespass and case appears to have been set-

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395. 14 Johns. 432 (N.Y. Sup. Ct. 1817).

396. This issue was raised in New York in 1803, but it was not decided in that case. Purdy v. Delavan, 1 Cai. R. 304 (N.Y. Sup. Ct. 1803). The unanswered question was whether trespass was the proper action to recover damages for a conspiracy to burn down a barn. Although the case was decided on other grounds, the three judges, including Kent and Livingston, affirmed in dicta the immediate/consequential distinction between trespass and case. *Id.* at 315, 322-23.

397. *See supra* note 361.

398. *Blin*, 14 Johns. at 433.

399. Percival v. Hickey, 18 Johns. 256 (N.Y. Sup. Ct. 1820).

400. *Id.* at 261.

401. *Id.* at 284.

402. *Id.* at 289.

403. M'Allister v. Hammond, 6 Cow. 342 (N.Y. Sup. Ct. 1826); Wilson v. Smith, 10 Wend. 324, 328 (N.Y. Sup. Ct. 1833); Dalton v. Favour, 3 N.H. 465, 466 (1826). Chief Justice Savage acknowledged the disagreement between King's Bench and Common Pleas in England whether plaintiff had the election to sue in trespass or case for immediate injury caused by defendant's negligence. *M'Allister*, 6 Cow. at 346.

tled for the most part in other American jurisdictions by this time although some courts struggled with its application.[404]

With this understanding of the fault principle of tort law, one can better understand why the doctrine of contributory negligence emerged. The following analysis will show that contributory negligence was a logical refinement of the fundamental moral principle that runs through these early tort cases: [I]ndividuals must conform to standards of reasonable care to avoid injuries. If they do not, they are culpable and therefore liable for the injuries they cause. Contributory negligence merely applied this duty of care to the injured party as well as to the party committing the injury. This defense encompassed both elements of tort liability: causation and fault. The contributory negligence cases reveal that the principles underlying contributory negligence were extensions of the notions of causation and fault. Thus, the party who was in the best position to avoid the injury and did not was the cause of the injury, and a party may not benefit from his own negligence.

Although King's Bench very likely suggested the contributory negligence defense in 1617,[405] it did not become an important doctrine until the late eighteenth century. One reason for its late prominence is the relatively simple factual circumstances relating to causation in earlier cases. Whether the plaintiff was a shipper suing to recover for goods lost by a common carrier, a passenger suing for personal injuries incurred while being transported on a common carrier, a pedestrian who was run down by a horse and carriage, or an owner of a ship or carriage that was damaged when the defendant's ran into it, the defendant did not contest that he caused the loss or injury. Rather, the defendant contested whether he caused the loss or injury under circumstances which rendered him culpable and therefore liable.

In the late eighteenth and early nineteenth centuries, defendants began to contest their liability with increasing frequency by arguing that it was plaintiff's negligence, rather than their own carelessness, that was responsible for the in-

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404. For example, the Connecticut Supreme Court in 1819 rejected the election rule in a three to two decision. Writing for the majority, Chief Justice Hosmer insisted that trespass must be brought whenever an act caused immediate injury regardless whether the act was a negligent or careless one. He reasoned that "he who strikes another through negligence, or by accident, is as much a trespasser, as if the stroke had been intentionally given." Gates v. Miles, 3 Conn. 64, 70 (1819). The court held that plaintiff must bring his action in trespass to recover for damage to his ship caused when defendant carelessly steered his ship into it. Moreover, Nathan Dane asserted in 1823:

> It is a settled distinction, that where an act is done, which is, *in itself*, an *immediate injury* to another's person, or property, then the action is, usually, by an action of trespass, *vi et armis*. But when there is no act done, but only a *culpable omission*, or where the act done is not *immediately* injurious, but only by *consequence*, and *collaterally*, then only a special action on the *case* lies for the damages *consequent* on such *omission* or *act*.

2 N. DANE, *supra* note 21, at 488. Yet, he also wrote that the distinction between the two forms of action "will never be clear of doubt." *Id.* at 487. Nonetheless, in a 1851 ship collision case the United States Supreme Court dismissed the point raised on appeal that the plaintiff incorrectly brought an action on the case but should have sued in trespass stating it was "so obviously untenable" that it did not require the Court's consideration. Williamson v. Barrett, 54 U.S. (13 How.) 101, 112 (1851). *See also* Jordan v. Wyatt, 45 Va. (4 Gratt.) 151, 153-59 (1847) (explanation of immediate/consequential distinction between trespass and case and plaintiff has a choice of remedy); B. OLIVER, JR., FORMS OF PRACTICE OR AMERICAN PRECEDENTS IN ACTIONS, PERSONAL AND REAL 572-77 (1840).

405. Weaver v. Ward, Hob. 134, 80 Eng. Rep. 284. *See supra* notes 276-79 and related text.

jury. In 1793, for example, King's Bench reversed a jury verdict for the plaintiff compensating him for the loss of his horses which caught cold and died after they transported timber for the defendant. The plaintiff sued in case and argued that the defendant was liable because he failed to inform the plaintiff where to unload the timber. The horses were left standing in the cold while the plaintiff sought to learn where the timber should be piled. The court concluded that the loss of plaintiff's horses was "owing to himself, and through his own default," because he could have unhitched his horses and walked them to a stable; or he could have unloaded the timber at a convenient place and left.[406]

The defense of contributory negligence was available to defendants in actions of trespass *vi et armis* as well. For example, an action of trespass was brought in 1810 against the driver of a horse and cart that collided with the plaintiff's chaise and killed the plaintiff's horse. The defendant pleaded the defense of contributory negligence. However, the defense failed in this case because the defendant's lawyer incorrectly pleaded not guilty, rather than confessing the trespass and pleading contributory negligence as an excuse. Nevertheless, Lord Ellenborough affirmed the defense of contributory negligence in language reminiscent of *Weaver v. Ward* as it was interpreted by other judges and treatise writers of the period. Ellenborough held that "[t]his is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable."[407] However, the defendant would have been liable if he could have avoided injuring the plaintiff and did not. Lord Ellenborough explained that since the defendant ran into plaintiff's chaise and killed plaintiff's horse, "he ought to have put upon the record any justification he may have for doing so. The plea denying these acts must clearly be found against him."[408] Consequently, liability in running-down cases such as this action in trespass did not turn on questions of causation alone because the defendant clearly caused plaintiff's injury and the proper pleading would have so acknowledged. Rather, liability in trespass depended on the culpability of the parties.

An 1815 decision in New York similarly recognized the plaintiff's negligence as a good defense in a trespass action.[409] In that case, the plaintiff proved that the defendant's hogs had repeatedly come onto his land through a fence that divided their farms and destroyed the plaintiff's corn. The defendant proved that the plaintiff's fence "was out of repair, and utterly insufficient."[410] The town by-laws required the owners of hogs to keep them off the highways, but they did not require owners to keep them enclosed. Consequently, the common law in New York placed on adjacent land owners the duty to erect partition fences to keep their neighbors' livestock off their lands. The court held:

> The case rests, then, upon common law principles, independent of the by-law; and as it appears that the swine entered the cornfield through that part of the interior fence

406. Virtue v. Birdie, 2 Lev. 196, 83 Eng. Rep. 515 (K.B. 1793).
407. Knapp v. Salsbury, 2 Camp. 500, 170 Eng. Rep. 1231 (K.B. 1810).
408. *Id.*
409. Shepherd v. Hees, 12 Johns. 433 (5 N.Y. 1815).
410. *Id.* at 433.

> which the plaintiff below was bound to keep in repair, but which he suffered to decay, so as to be utterly insufficient; the loss he complained of was occasioned by his own negligence; and he has suffered *damnum absque injuria*.[411]

The availability of contributory negligence as a defense in trespass is additional evidence that strict liability was not the standard of liability in such cases by the nineteenth century. If it were, the plaintiff's fault would make no difference in assessing liability. Plaintiffs would merely have to prove injury and that it was the direct result of the defendant's act. The recognition of contributory negligence as a defense to actions of trespass *vi et armis* suggests that plaintiffs were required to prove fault or culpability in addition to the injury and the defendant's immediate act as the cause. The Virginia Court of Appeals, in 1847, expressly identified fault as a prerequisite to liability in the action of trespass *vi et armis* when it concluded that the defendant's "only ground of defense . . . would have been, that he was in no wise careless or negligent, but had proceeded with due caution and circumspection, and that the injury done by his act was occasioned by unavoidable accident."[412]

In England, defendants invoked the doctrine of contributory negligence when they were sued in actions on the case for negligence for driving their carriages or riding their horses on the wrong side of the road. These cases evince the fault-based principle of tort and suggest part of the reason why they were brought with increasing frequency. Defendants who were driving on the wrong side of the road at the time of the collision were not liable for the plaintiffs' injuries unless plaintiffs could prove that the defendants were also at fault. King's Bench explained that "[i]n the crowded streets of a metropolis . . . situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary."[413] Moreover, the court declared, liability is a question of negligence, of which juries are the "best judges."[414] This determination should be made "independently of the law of the road."[415] Thus, plaintiffs had the same duty as defendants to avoid unnecessary injury. If plaintiffs breached this duty, they had to bear any consequent loss. Fairness precluded compensating individuals for losses sustained by their own carelessness. The underlying principles in these cases are that an individual may not benefit from his own fault or wrongdoing; and the party who is in the best position to avoid the injury is responsible and must bear the loss for it.

In the first in this line of English cases, the plaintiff sued in case for negligence and recovered damages for the loss of his horse despite very strong evidence of his servant's own negligence.[416] The defendant was driving his one-horse chaise on the wrong side of the road and collided with the plaintiff's horse. That the defendant was driving on the wrong side of the road did not in itself render him liable. Lord Kenyon instructed the jury:

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411. *Id.* at 434.
412. Jordan v. Wyatt, 45 Va. (4 Gratt.) 151, 157 (1847).
413. Wayde v. Lady Carr, 2 Dowl. & Ry. 255, 256, 25 Rev. Rep. 554, 554 (K.B. 1823).
414. *Id.*
415. *Id.*
416. Cruden v. Fentham, 2 Esp. 685, 170 Eng. Rep. 496 (C.P. 1798).

> Though a carriage might be driving on the wrong side of the road, if there was sufficient room for other carriages and horses to pass on the other, a person was not justified in crossing out of the way, in order to assert what he termed the right of the road.[417]

In this case the road was of "considerable breadth, so that the [plaintiff's] servant could have passed without any difficulty."[418] However, "without any reason," the servant crossed over to the side on which the defendant's chaise was being driven and tried unsuccessfully to pass between the chaise and the footpath.[419] Although Lord Kenyon expressed his belief to the jury that the plaintiff's servant put himself "voluntarily into the way of danger, and the injury was of his own seeking," he left this question of fact to the jury.[420] He refused to reverse the jury's verdict for the plaintiff stating that it was best to leave it where it was "as it was a question of public convenience."[421]

It was the plaintiff who was riding on the wrong side of the road in the next case. Yet, the plaintiff recovered for the loss of his horse which died after defendant's servant negligently drove the defendant's chaise into him.[422] The collision occurred when the defendant's servant turned into the road and crossed over to the proper side. Lord Ellenborough instructed the jury that although the plaintiff's servant was on the wrong side of the road, that "was not sufficient to discharge the defendant."[423] If the road was wide enough for the defendant's servant to pass, he had a duty to avoid colliding into the party who was on the wrong side. If he failed to do so, he would be answerable for any injury. Lord Ellenborough's explanation reflected traditional principles of tort: "A person being on the wrong side of the road could not justify another in wantonly doing an injury, which might be avoided."[424] He left to the jury the question whether "there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road."[425] The jury found for plaintiff.

These cases involving the rule of the road provided authority for the 1809 decision credited with establishing the contributory negligence rule. *Butterfield v. Forrester*[426] is a clear expression of the fault principle applied to both parties. The plaintiff sued for injury to his horse when he rode it into a pole the defendant had put across a portion of the road to divert traffic away from his house on

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417. *Id.* at 686, 170 Eng. Rep. at 496.

418. *Id.* at 685, 170 Eng. Rep. at 496.

419. *Id.*

420. *Id.* at 686, 170 Eng. Rep. at 496.

421. *Id.*

422. Clay v. Wood, 5 Esp. 44, 170 Eng. Rep. 732 (K.B. 1803).

423. *Id.* at 44, 170 Eng. Rep. at 732.

424. *Id.* at 45, 170 Eng. Rep. at 732.

425. *Id. See also,* Wordsworth v. Willan, 5 Esp. 273, 170 Eng. Rep. 809 (C.P. 1806); Pluckwell v. Wilson, 5 Car. & P. 375, 172 Eng. Rep. 1016 (C.P. 1832).

A rule of the sea similar to the rule of the road was used to determine liability in ship collision cases. However, liability attached to the party "whose negligence it was by which the injury was caused." Handaysyde v. Wilson, 3 Car. & P. 528, 530, 172 Eng. Rep. 532, 533 (C.P. 1828). Consequently, Chief Justice Best declared that, "although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course." *Id.*

426. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

which he was making repairs. The pole did not completely obstruct the road. A witness testified that the plaintiff "was riding violently," and if he had not been riding so fast he could have avoided the pole and passed uninjured.[427] Justice Bayley charged the jury

> that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant.[428]

The jury decided in favor of the defendant, and the court affirmed. Justice Bayley observed that the plaintiff had been riding his horse "as fast as the horse could go," but "[i]f he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault."[429]

Lord Ellenborough agreed. One may not "cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not [sic] himself use common and ordinary caution to be in the right."[430] Referring to the rule of the road cases, he asserted that "[o]ne person being in fault will not dispense with another's using ordinary care for himself."[431] However, Lord Ellenborough then stated the rule of contributory negligence in a way that seemed to impose on plaintiffs the duty of proving that they had used ordinary care as an element of their case against a negligent defendant: "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."[432] He later expressed the same principle in other terms: "It [is] not competent to the plaintiff to attach that blame to the defendant which was the common blame of both."[433]

Butterfield is important for two reasons. It was recognized in the early nineteenth century as authority for the contributory negligence rule in England and in the United States even though it was not the first case to articulate the doctrine. It is also significant because it shows that contributory negligence was merely a logical extension of, rather than a radical departure from, established principles of tort law which imposed a duty of due care on the plaintiff in avoiding injury.

The Court of Common Pleas articulated the doctrine of contributory negligence in 1810 in terms of proximate and remote cause.[434] Plaintiff sued to recover for the loss of his chaise and for personal injuries incurred when he overturned the carriage trying to avoid a pile of lime and rubbish placed on the road by the defendant's bricklayers. The jury had to decide two questions: whether

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427. *Id.* at 60, 103 Eng. Rep. at 927.

428. *Id.*

429. *Id.* at 61, 103 Eng. Rep. at 927.

430. *Id.*

431. *Id.*

432. *Id.* Some American courts later interpreted this to mean that plaintiffs had the burden of proving not only the defendant's negligence, but their own due care or absence of negligence. *See, e.g.*, Adams v. Carlisle, 38 Mass. (21 Pick.) 146, 147 (1838).

433. Hill v. Warren, 2 Stark. 332, 333, 171 Eng. Rep. 678, 678 (K.B. 1818) (defendant not liable for injury to plaintiff's house caused by removal of party wall by workers hired jointly by plaintiff and defendant).

434. Flower v. Adam, 2 Taunt. 314, 127 Eng. Rep. 1098 (C.P. 1810).

the obstruction or plaintiff's unskillful driving caused the accident, and whether placing the pile of rubbish and lime at the side of the road was negligent. On the second question, the court assumed that custom established the standard of care for which the defendant was responsible. The judge charged the jury that, if they decided the rubbish pile caused the injuries, but that the workmen's placing the lime and rubbish before the door of defendant's house was no more than one would do in the usual course of business, then they should find that the injury occurred from mere accident and not from the defendant's blameable negligence. The court thus applied business custom as the standard of care required of the defendant in assessing liability.[435] If the jury found that the injury arose from the plaintiff's lack of skill in driving his chaise, they should likewise decide for the defendant regardless whether the defendant was negligent.

The jury found for the defendant, and the plaintiff moved for a new trial. The plaintiff argued that, if the defendant was blameworthy in piling lime and rubbish in the road, then he could not escape liability for the resulting injury even if the plaintiff was too unskillful to avoid injury. The court rejected this argument, stating that the rubbish pile was too remote a cause of the accident because it was the plaintiff's unskillfulness in handling the horse that overturned the chaise. "The immediate and proximate cause is the unskillfulness of the driver," Judge Lawrence declared.[436]

Cases were brought with increasing frequency in which fault was equated to causation, blurring the distinction between the two concepts. This development can be explained as an evolution of the tort principle that the party in the best position to avoid the injury should bear the loss. It was a small conceptual step to the idea that the party who could have avoided the injury and did not was in fact the cause of it. In an 1828 case, for example, the defendant's ship ran into the plaintiffs' anchored boat.[437] The collision occurred at night, and the defendant's crew was unable to see plaintiffs' boat. The defendant argued that plaintiffs' crew were contributorily negligent in causing the collision because they were all below, and, if any had been on deck, they could have avoided the collision by shifting the position of their boat slightly. Although the court acknowledged that the question of negligence was for the jury to decide, Lord Tenterden instructed them that the plaintiffs could not maintain their action if the jury found that "there was want of care on both [parties] . . . . [T]o enable them to [recover], the accident must be attributable entirely to the fault of the crew of the defendants."[438] Like Lord Ellenborough's statement of the rule in *Butterfield*, this instruction could be read as placing on the plaintiffs the burden of proving that they were not negligent. There is a certain logic in placing this burden on the plaintiff if it is understood as part of the plaintiff's burden of proving causation. The jury, nevertheless, found for the plaintiffs.

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435. The court did the same in Jackson v. Tollett, 2 Stark. 34, 38, 171 Eng. Rep. 564, 565 (K.B. 1817).

436. Flower v. Adam, 2 Taunt. 314, 317, 127 Eng. Rep. 1098, 1100 (C.P. 1810). *See also Jackson* at 34, 171 Eng. Rep. at 564.

437. Vanderplank v. Miller, 1 M. & M. 169, 173 Eng. Rep. 1119 (K.B. 1828).

438. *Id.* at 170, 173 Eng. Rep. at 1120.

The following year another defendant in a similar case argued more plausibly that the plaintiff's contributory negligence caused the collision of two barges.[439] The defendant's barge ran into plaintiff's moored barge. However, evidence showed that the plaintiff had moved his barge into a dangerous place in the river, and no one was on board. Lord Tenterden instructed the jury that the defendant was not liable if the injury was not foreseeable. So, he continued,

> if the plaintiff's men had put this barge in such a place that persons using ordinary care would run against it, the defendant will not be liable. Nor will he be liable if the accident could have been avoided, but for the negligence of the plaintiff's men in not being on board his barge at a time when it was lying in a dangerous place.[440]

He concluded that the defendant was liable only "if the accident arose from the negligence or want of skill in his own men."[441] This was the question for the jury to decide, and they found that the injury arose from the lack of care and caution of the defendant's crew.

A subtle, though significant, distinction emerged in the articulation of the doctrine of contributory negligence. Some decisions stated that any negligence on the part of the plaintiff that contributed to the injury precluded recovery.[442] This was taken to mean that both parties were at fault if the plaintiff "were in any degree in fault, in not endeavoring to prevent" the injury.[443] Therefore, a plaintiff was contributorily negligent in causing his injury if "by ordinary care" he could "have avoided the consequences of defendant's negligence."[444] On the other hand, even a negligent plaintiff could recover if he could not have avoided the injury through the exercise of ordinary care.[445]

With both parties being negligent, courts framed the issue of fault in terms of which party was in the best position to prevent the injury. As between two wrongdoers, that party who could have prevented the injury but did not was liable because his negligence was the proximate cause of the harm. As the concepts of causation and fault merged, and as courts attempted to assess the responsibility of plaintiffs as well as defendants for the injury, the concepts of proximate and remote cause evolved.

This analysis is reflected in the leading case on contributory negligence in the nineteenth century, *Davies v. Mann*,[446] known as the Donkey Case. There, the plaintiff sued for the loss of his donkey after the defendant's servant, driving at "a smartish pace" ran over the donkey and killed it.[447] The donkey was unable to avoid the wagon because the plaintiff had tethered him near the road to graze. Although this presented evidence of plaintiff's negligence in creating this dangerous situation, Lord Erskine instructed the jury that, "if the proximate

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439. Lack v. Seward, 4 Car. & P. 106, 172 Eng. Rep. 628 (K.B. 1829).

440. *Id.* at 106, 172 Eng. Rep. at 628.

441. *Id.*

442. Pluckwell v. Wilson, 5 Car. & P. 375, 172 Eng. Rep. 1016 (C.P. 1832); Luxford v. Large, 5 Car. & P. 421, 426, 172 Eng. Rep. 1036, 1038 (K.B. 1833).

443. Vennall v. Garner, 1 Cromp. & M. 21, 22, 149 Eng. Rep. 298, 298 (Ex. 1832).

444. Bridge v. Grand Junction Ry. Co., 3 M. & W. 244, 247, 150 Eng. Rep. 1134, 1135 (Ex. 1838).

445. *Id.* at 248, 150 Eng. Rep. at 1135.

446. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

447. *Id.* at 549, 152 Eng. Rep. at 589.

cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon [sic], the action was maintainable against the defendant."[448] The jury decided in favor of the donkey's owner.

The Court of Exchequer rejected the defendant's motion for a new trial. Lord Abinger declared that it made no difference that the donkey was improperly on the highway, "for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences."[449] Lord Parker concurred:

> [A]lthough there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong.[450]

Parker explained that the party at fault was the one whose behavior was the proximate cause of the injury. He based this rule on the policy of insuring public safety and preventing unnecessary harm: "were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."[451] The intertwining of the moral principle of tort and the policy of preventing injury again rationalized evolving rules of tort law: contributory negligence and proximate causation.

American contributory negligence cases reflect the same tort principles, the same theories, and the same rules as the English cases. Some of the earliest American contributory negligence cases involved injuries caused by defective roads and bridges. One of the interesting aspects of these cases is that, under common law, parties could not sue towns for damages arising from defects in roads.[452] The right to sue was given by statute which imposed on towns the duty to keep roads and bridges in good repair. Nonetheless, rather than holding towns strictly liable for their breach of this statutory duty, courts applied the tort principle of fault and the doctrine of contributory negligence in determining whether towns were liable for injuries attributable to their failure to maintain roads, bridges, and canals in good repair.[453]

The earliest such case in Massachusetts was brought in 1808 by a town surveyor whose duty it was to keep the roads and bridges in good repair. He sued the town of Waterville for double damages under a 1786 statute for the loss of his horse which fell through a defective bridge. Chief Justice Parsons

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448. *Id.* at 547, 152 Eng. Rep. at 588.

449. *Id.* at 548, 152 Eng. Rep. at 589.

450. *Id.* at 549, 152 Eng. Rep. at 589 (quoting himself in Bridge v. Grand Junction Ry. Co., 3 M. & W. 245, 248, 150 Eng. Rep. 1134, 1135 (Ex. 1838)).

451. Davies v. Mann, 10 M. & W. 546, 549, 152 Eng. Rep. 588, 589 (Ex. 1842).

452. Farnham v. Concord, 2 N.H. 392, 393 (1821).

453. *Id.* In a similar vein, the New York Supreme Court in 1807 described the statutorily imposed duty of a canal company to keep a canal in good repair in terms of due care, and its liability for breach of this duty in terms of culpable neglect. Its failure to keep the canal in good repair rendered it liable "in all such cases, where an injury has been sustained, by the want of the due care and caution . . . [or] neglect and omission." Steel v. Western Inland Lock Navigation, 2 Johns. 283, 286 (N.Y. Sup. Ct. 1807). Consequently, the court held that the plaintiff was entitled to recover for "any injury [sustained] in consequence of the *culpable neglect* of the defendants." *Id.* (emphasis added).

held that the town was liable under the statute for injuries caused by its failure to make repairs, but only so long as "the party injured is in no fault. For it cannot be presumed," he explained, "that the act intended to provide a remedy for damages sustained by any man through his own wrong."[454] The court set aside the jury verdict for the plaintiff because the trial judge refused to admit evidence showing that the plaintiff was the person responsible for keeping the town roads and bridges in good repair.

The new trial ordered by the court again resulted in a jury verdict for the plaintiff which the court again set aside on the grounds that the plaintiff could not recover for "damage arising from his own default."[455] The default or wrong in this case was the plaintiff's failure to keep the bridge in good repair as he was required by law. However, the theory underlying the court's rejection of the jury's verdict was based on the moral principle of fault that underlay tort liability for breach of a duty of care: a party could not benefit from his own wrong.

Chief Justice Parsons applied the same rule in a case the following year.[456] There, the plaintiff owned a raft and was transporting a cargo of lumber across a canal operated by the defendant canal corporation. The raft ran aground because the canal was too shallow and narrow. The plaintiff was forced to break up the raft and transport the lumber by land. Moreover, he lost some of the shipment because of a storm that arose while the raft was grounded in the canal. He sued for the loss of the raft, the loss of the lumber, and for the delay and inconvenience of transporting the lumber by land. The defendants moved for a new trial after a jury verdict for the plaintiff because, *inter alia*, the plaintiff foolishly left his raft unattended while it was aground. They argued that when a loss is "incurred by the negligence and folly of the party, he is certainly not entitled to an action for such damage."[457] Chief Justice Parsons acknowledged that the plaintiff should not recover if his loss was due to his own negligence, but he concluded that this plaintiff's "conduct was prudent," and that the "misfortune must fall on the defendants; as it did not arise from the imprudent neglect of the plaintiff."[458]

The New Hampshire Supreme Court also applied contributory negligence in road defect cases, and it expressed the theory in terms of proximate and remote cause in an 1821 case.[459] The injury "must result directly from the want of repairs to the highway," the court declared. "It is not enough that a defect in the road may have indirectly contributed to produce the damage, but the loss must be produced directly by the defect."[460] The court read into the New Hampshire statute giving rise to the cause of action[461] a limitation of liability derived from the moral principle of tort: "the statute intended to give relief only

454. Wood v. Waterville, 4 Mass. 422, 423 (1808).

455. Wood v. Waterville, 5 Mass. 294, 299 (1809).

456. Riddle v. Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169 (1810).

457. *Id.* at 172. Counsel here cited to Virtue v. Birdie, 2 Lev. 196, 83 Eng. Rep. 515 (K.B. 1793), discussed *supra* at note 406.

458. *Riddle*, 7 Mass. at 183.

459. Farnham v. Town of Concord, 2 N.H. 392 (1821).

460. *Id.* at 394.

461. *Id.* at 393. The court was referring to 1786 N.H. Laws 389, which provided:

in cases of losses, resulting directly from defects in the highways, and which ordinary care and prudence could not avoid."[462] Consequently, the driver of a horse and carriage who came to a bridge which was visibly in disrepair and clearly unsafe to cross and attempted to cross anyway could "maintain no action against the town, because the loss must be attributed to his own fault and folly in attempting to pass such a bridge."[463]

American courts also applied contributory negligence in cases where defendants were private individuals. In a Massachusetts case[464] described by Professor Horwitz as "the most influential decision" in the early development of the rule, the plaintiff was barred from recovering for an injury to his horse which ran against a log that projected from a wood pile and partially obstructed the road.[465] Although the defendant was legally responsible for the obstruction, the jury found the plaintiff negligent in overloading his wagon and driving so fast that he was unable to avoid the obstacle.

On appeal, the plaintiff contended that he should recover even though his driver had not exercised ordinary care because the defendant, in committing an unlawful act, was originally at fault. Chief Justice Parker conceded that one who committed an unlawful act should be liable for all injury resulting from it regardless whether the injured party exercised ordinary care, "for it could not be rendered certain, whether, if the road were left free and unincumbered, even a careless traveller or team driver would meet with any injury."[466] However, the court refused to hold the defendant strictly liable to private individuals for his unlawful act. Explaining the rule of contributory negligence in terms of causation, the court held that the plaintiff would have to "show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury."[467]

The New York Supreme Court reflected this merger of fault and causation in 1823. To determine whether the defendant was liable for an injury to the plaintiff, the court observed, "it is necessary to inquire, not only whether the defendant has been guilty of culpable negligence on his part, but whether the plaintiff is free from a similar charge."[468] The court relied as authority on the "ancient maxim, *that no man shall take advantage of his own wrong or negligence*, in his prosecution or defense against another."[469]

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that in case any special damage shall happen to any person or persons . . . by means of the insufficiency or want of repairs of any highways or bridges in any town or parish with in this state, the party aggrieved shall recover his or their damage in an action against the town or parish.

462. *Id.* at 394.

463. *Id.*

464. Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

465. M. HORWITZ, *supra* note 3, at 303 n.192. Horwitz's characterization of this case seems to be exaggerated, since American courts cited to English decisions, particularly *Butterfield v. Forrester*, discussed *supra* notes 426-32, as authority for the rule. *Butterfield* was acknowledged by the United States Supreme Court and American treatise writers as establishing the rule of contributory negligence.

466. *Smith*, 19 Mass. at 623.

467. *Id.*

468. Bush v. Brainard, 1 Cow. 78 (N.Y. 1823).

469. *Id.* at 79 n.(a) (construing *Shepherd v. Hees*, discussed *supra* note 409). *See also* Washburn v. Tracy, 2 D. Chip. 128, 136 (Vt. 1824).

In holding that the plaintiffs' negligence barred recovery from negligent defendants, American courts sometimes imposed on plaintiffs the burden of proving that they had exercised ordinary care as an element of their action.[470] Chief Justice Savage of the New York Supreme Court expressed this conception of the rule when he declared in 1826 that "[n]egligence by the defendant, and ordinary care by the plaintiff, are necessary" for the plaintiff to recover.[471] Twelve years later Chief Justice Lemuel Shaw similarly interpreted a Massachusetts statute authorizing a cause of action for injury due to road defects:

> In order to maintain an action against a town, upon the statute, for damage occasioned by a want of repair on the highways, two things must concur; first, the highway was out of repair, and secondly, that the party complaining was driving with ordinary care and skill. Otherwise, although the way be out of repair, it would not follow that the plaintiff's loss was occasioned by it.[472]

These decisions requiring the plaintiff to prove that he had exercised ordinary care as an element of his claim suggest a change in the tort rules of negligence. The change consisted of shifting the burden of proof regarding the plaintiff's behavior from the defendant—who would have had to show that the plaintiff was contributorily negligent as an affirmative defense to his own negligence—to the plaintiff, who now was required to prove that he did not cause his injury through his own carelessness. Chief Justice Shaw made this explicit when he declared that "the burden of proof is . . . on the plaintiff to show, not only the defects in the highway, but that he was free from negligence, or, in other words, using due care and skill."[473]

Requiring plaintiffs to show that their negligence did not contribute to their injuries does not appear to have stemmed from judges looking to shield defendants from liability. Courts sometimes were lenient in permitting juries to find that plaintiffs had exercised ordinary care. For example, although the Maine Supreme Court recognized that plaintiffs had the burden of proving they had exercised due care, it did not require direct and conclusive proof when it was not available.[474] In one case, the plaintiff was thrown into a brook when his horse-drawn gig ran off a bridge that lacked railings or guards.[475] No one witnessed the accident. Although the horse was proven to be kind, well broken, and easily managed, wheel tracks in the road indicated that the horse had become unmanageable. The trial judge refused to give the case to the jury and nonsuited the plaintiff.

On appeal, the Maine Supreme Court sustained plaintiff's exceptions to the trial judge's decision and held that the plaintiff was not always bound to prove due care affirmatively, for many plaintiffs who sustained an injury when alone would be without a remedy. The supreme court went on to find sufficient cir-

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470. Crumpton v. Solon, 11 Me. 335, 336-37 (1834).

471. Harlow v. Humiston, 6 Cow. 189, 191 (N.Y. 1826).

472. Adams v. Carlisle, 38 Mass. (21 Pick.) 146, 147 (1838).

473. *Id.* If the defendant argued that the plaintiff was contributorily negligent, the plaintiff then had the burden of proving that any negligence on his part did not contribute to causing the injury. Lane v. Crombie, 29 Mass. (12 Pick.) 177, 178 (1831).

474. Foster v. Dixfield, 18 Me. 380 (1841).

475. *Id.*

cumstantial evidence of the plaintiff's due care to have required the trial judge to give the case to the jury: the horse's disposition, the obvious condition of the bridge which would have alerted the plaintiff that care was required for his safety, the absence of evidence that the plaintiff did not exercise due care, and the assumption that the plaintiff would have prevented the erratic and dangerous movement of the carriage if he could have.

In a subsequent Maine case, an obstruction across a road curiously provided the court with sufficient circumstantial evidence that the plaintiff had exercised due care.[476] Brunswick townspeople had stretched a rope across a road to hold a raft loaded with logs. The plaintiff was riding his horse one evening and was thrown by the rope. The court concluded that the plaintiff could not have foreseen this obstruction and would not have anticipated it; it thus inferred due care from the circumstances.[477]

American courts, like those in England, applied contributory negligence in collision cases involving the rule of the road. However, an early Massachusetts case can be read as applying a strict standard of liability for injuries caused by defendants driving on the wrong side of the street.[478] The opinion is ambiguous, for it suggests that individuals who failed to drive on the right side of the road as required by statute were liable for injuries caused thereby, but the facts of the case demonstrate that the defendant carelessly ran into the plaintiff's carriage, which was on the correct side of the street. Consequently, this case served as authority for a Maine decision declaring that travelers on the wrong side of the road were bound to use ordinary care not to obstruct one traveling on the right side of the road. One who failed to do so "must answer for the consequences of such violation of his duty."[479]

Collision cases also provided the opportunity for American courts to affirm the English rule in *Davies v. Mann*,[480] that, notwithstanding the plaintiff's negligence, he could still recover if his negligence was not the proximate cause of the injury because the defendant could have avoided the injury. Thus, the Maine Supreme Court explained that the plaintiff was barred from recovery only if his negligence contributed to the injury.[481] "But if he did not use ordinary care," the court continued, "and yet did not by want of it contribute to produce the injury, he will be entitled to recover."[482]

The court explained that the common law did not apportion loss in cases involving contributory negligence. "The wrongdoer is made responsible for his own misconduct, not for the consequences of another's neglect to exercise ordinary care."[483] This statement reflects nineteenth-century liberal values which reinforced the moral principle of tort that underlay the rule of contributory negligence. Consequently, a negligent plaintiff who was injured in a collision in

476. French v. Brunswick, 21 Me. 29 (1842).
477. *Id.* at 32.
478. Fales v. Dearborn, 18 Mass. (1 Pick.) 345 (1823).
479. Palmer v. Parker, 11 Me. 338, 339 (1834).
480. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).
481. Kinard v. Burton, 25 Me. 39, 49 (1845).
482. *Id.*
483. *Id.* at 50.

which the defendant was on the wrong side of the road could not recover if his negligence contributed to the collision.[484] On the other hand, even negligent plaintiffs were sometimes permitted to recover if the defendant, exercising ordinary care, could have avoided the injury. The United States Supreme Court explained in 1850 that "[o]ne person suing in fault will not dispense with another's using ordinary care."[485] Some courts allowed recovery, provided that the plaintiff's negligence did not substantially contribute to the injury.[486] Other courts required the plaintiff to be wholly without fault.[487] Still others permitted contributorily negligent plaintiffs to recover if the defendant was guilty of gross negligence.[488] Like those of England, American courts applied the same rules in cases involving boat collisions.[489]

The number of cases brought for injuries to strangers sharply increased at the end of the eighteenth and beginning of the nineteenth centuries. However, the rules and principles expressed by judges in these cases did not represent a new departure from established tort law. Rather, they were applications, extensions, and refinements of traditional tort principles and policies. The evidence presented here contradicts legal historians who argue that negligence was not an established or important doctrine until well into the nineteenth century. Even pleadings in trespass cases sometimes included allegations of carelessness or negligence by the end of the seventeenth century, and such cases appear to have been commonplace by the late eighteenth century. These cases and their interpretation by legal commentators suggest that judges and lawyers understood trespass as a fault-based tort action by this time. Even when cases involved legal duties imposed by statute, plaintiffs could not recover for injuries sustained from the breach of the duty if they were contributorily negligent. Consequently, even the failure to perform a legal duty did not impose strict liability by the eighteenth century.

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484. Parker v. Adams, 53 Mass. (12 Met.) 415 (1847). *See also* Churchill v. Rosebeck, 15 Conn. 359 (1843).

485. Williamson v. Barrett, 54 U.S. (13 How.) 101 (1851). The Court determined that the plaintiff reasonably relied upon the defendant to avoid the accident by maneuvering according to custom, which it did not.

486. New Haven Steamboat & Transp. Co. v. Vanderbilt, 16 Conn. 420 (1844); Birge v. Gardner, 19 Conn. 507 (1849).

Similarly, courts allowed a plaintiff to recover if his negligence did not "directly" contribute to his injury, Norris v. Litchfield, 35 N.H. 271 (1857), or if the defendant could have anticipated the injury. Loomis v. Terry, 17 Wend. 496 (N.Y. Sup. Ct. 1837).

487. Rathbun & West v. Payne, 19 Wend. 399, 400-01 (N.Y. 1838) (citing Pluckwell v. Wilson, 5 Car. & P. 375, 172 Eng. Rep. 1016 (N.P. 1832); Williams v. Holland, 6 Car. & P. 23, 172 Eng. Rep. 1129 (N.P. 1833); Lack v. Steward, 4 Car. & P. 72, 172 Eng. Rep. 628 (N.P. 1829)); Barnes v. Cole & Fitzhugh, 21 Wend. 188 (N.Y. 1839) (new trial granted because plaintiff received verdict although facts indicated that he must have contributed to his injuries).

488. *Rathbun & West*, 19 Wend. at 401; Hartfield v. Roper & Newell, 21 Wend. 615, 619 (N.Y. 1839); Wynn v. Allard, 5 Watts & Serg. 524, 525 (Pa. 1843).

489. Drew v. Steamboat Chesapeake, 2 Doug. 33, 37 (Mi. 1845) (departure of boat from custom of passing to the left of oncoming vessels is negligence which will render the party liable for a collision unless the other vessel could have prevented it "by reasonable effort"). *But see* Simpson v. Hand, 6 Whart. 311, 324 (Pa. 1840) (failure of anchored ship to observe Delaware River custom of setting a light on dark nights, "a precaution so imperiously demanded by prudence," is negligence per se and bars recovery even against a negligent defendant).

V. CONCLUSION

The theory of tort law as a system of civil wrongs based on personal culpability was established by the eighteenth century. The principles, policies, and most of the rules of modern tort were familiar to and accepted by judges and lawyers in England and the United States before the time when historians date the onset of the industrial revolution: the last quarter of the eighteenth century in England and the economic "take-off" period of the 1840s and 1850s in the United States. Moreover, judges from the seventeenth century into the nineteenth century, in England and in the United States, decided tort cases on the basis of enduring principles of morality intended to promote the same public policies of encouraging individuals to behave in a reasonable manner, to engage in economic relationships with honesty and fairness, and to use due care in avoiding injuries to others. Judges also sought to promote economic activity as a social good. However, they used tort law to protect and promote the economic interests of society generally, not the interests of particular classes. One fundamental moral principle of tort was that one who violated community standards of reasonable behavior and injured another was morally and therefore legally bound to compensate the victim. A corollary principle also encompassed notions of culpability and causation: Whoever was in the best position to avoid an injury was liable for it. The contemporary expression of this principle is identified with Dean Guido Calabresi.[490] As societal conditions changed, the judicial application of these principles and policies changed accordingly to achieve the same public policies. Judicial instrumentalism, understood as judges formulating, modifying, and changing rules to achieve desirable goals of public policy, was characteristic of the common-law system for centuries. It was not new or unique to the nineteenth century as some legal historians, such as Morton Horwitz, have argued.[491]

The evidence presented demonstrates that, in certain areas of tort law, courts continued to apply tort rules on the basis of traditional principles to achieve traditional policy goals as railroads emerged as the dominant form of public transportation. This was true in the areas of common carrier liability for lost or damaged goods and for injuries to passengers. Whether this conclusion holds true for common carrier liability for injuries to strangers requires another study. That question is too vast to address here. Nonetheless, this Article's conclusions concerning the common-law background of nineteenth-century tort law remain valid regardless of how judges later applied tort rules when railroads were defendants in cases of personal injury and property damage to strangers. Modern tort law was not the creation of judges in nineteenth-century America trying to protect business interests and to promote economic development. Nor was tort, at least in its early history, consciously designed to promote economic efficiency. Rather, modern tort principles and policies were the same principles and policies that courts had been applying for centuries to induce individuals to behave in morally and socially responsible ways.

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490. G. CALABRESI, THE COSTS OF ACCIDENTS 293-308 (1970).

491. M. HORWITZ, *supra* note 3, at 1-30.